Public Prosecutor v Samirah bt Muzaffar & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05(LB)-282–06 OF 2022 AND B-05–293–07 OF 2022
VAZEER ALAM, AHMAD ZAIDI IBRAHIM AND AZHAHARI KAMAL JJCA
26 JUNE 2025

Criminal Law — Murder — Whether death caused by accused — Firemen who put out fire in master bedroom of house found man dead on floor with head and bodily injuries — Autopsy showed man died of head injury caused by blunt impacts — Whether man's wife and stepsons ('accused') who were in the house caused the injuries — Whether no 'murder weapon' was recovered either from the scene or the house — Whether evidence at trial failed to explain how deceased sustained his injuries or what caused the bedroom fire — Whether prosecution also failed to prove time of deceased's death as stated in the charge — Whether prosecution failed to prove prima facie case of murder against accused — Whether accused were entitled to be acquitted without defence being called

The respondents in Appeal 282 were jointly charged together with another person still at large ('Eka') with murdering a man ('the deceased') in his house between 11.30pm on 13 June 2018 and 4am on 14 June 2018 in furtherance of a common intention to cause his death. At the end of the prosecution's case, the trial court found no prima facie case proven and acquitted and discharged the respondents without calling for their defence. The deceased was the first respondent's husband. The couple had two young children. The second and third respondents were the first respondent's children from an earlier marriage. All of them, together with their Indonesian maid, Eka, lived in the same house which was situated within a gated and guarded area. About an hour after the deceased returned home about 11.30pm on 13 June 2018, a neighbour alerted the security guards after noticing thick smoke emanating from the top floor of the deceased's house. One of the guards immediately called the fire services department who arrived to find that a fire had broken out in the master bedroom. After putting out the fire, the firemen found the deceased lying dead on the floor and that he had injuries on his head. They also found a burnt mobile phone on the bed. Sniffer dogs from the fire department's K9 unit were brought to the scene to help detect the presence of any combustible substance. Initial tests done by the fire department on residues taken from the room did detect traces of petrol, which led the fire department to classify the fire as 'incendiary'. However, similar analysis done by the Chemistry Department ruled out the presence of petrol. The first autopsy on the deceased, conducted by a forensic pathologist (PW46) at Hospital Kuala Lumpur, found that the

deceased had died of 'complication of blast and blunt penetrating injuries'. PW46 opined that a blunt instrument, such as a hammer (none was recovered from the scene), could have caused the penetrating wounds on the deceased's head which damaged his brain and caused severe bleeding. PW46 found 16 different injuries on the deceased — many of which were shrapnel-like — that led him to conclude that they could have been caused by a blast or explosion. On the application of the deceased's siblings, a magistrate allowed a second autopsy to be performed by another forensic pathologist (PW50) after the body was exhumed four months later. PW50 ruled that the death was caused by 'multiple blunt impacts to the head'. The trial judge held, inter alia, that: (a) impacts to the deceased's head from a blunt instrument caused his death; (b) the injuries were deliberately inflicted and were sufficient in the ordinary course of nature to cause death; (c) the prosecution had failed to prove that the respondents had caused the injuries and also failed to prove that the death occurred during the timeframe specified in the charge; (d) the fire in the bedroom was intentionally caused with the use of petrol; (e) no blast or explosion occurred at the scene at the material time; and (d) police investigations into the case were lackadaisical as no attempt was made to contact, arrest, record a statement from or call as a witness the house maid, Eka, even though police knew of her whereabouts. As the respondents were allowed to make all relevant submissions during the hearing of the prosecution's appeal, the court found the respondents' appeal to be redundant and summarily struck it off.

Held, unanimously dismissing the prosecution's appeal and affirming the respondents' acquittal and discharge:

(1) The prosecution had failed to prove a prima facie case in respect of the charge against the respondents (see para 110).

(2) There was no reason to interfere with the trial judge's finding that the prosecution had failed to establish the time of death of the deceased as stated in the charge. The trial judge was right in dismissing the prosecution's reliance on PW50's evidence on the time of death as: (a) he had contradicted his own post-mortem report; (b) his finding that the deceased had died between 1.30am and 5.30am on 14 June 2018 was made at the 11th hour solely based on photographs which were available to him from the start; (c) PW46, who was in a better position to determine the time of death, was never asked on the issue of rigor mortis or hypostasis in determining time of death; (d) PW46 himself testified that he could not determine the time of death despite conducting the first post-mortem on the date of the incident; and (e) PW50 admitted that rigor mortis and hypostasis were poor indicators to determine time of death, especially when heat rigor was present (see paras 55–56).

(3) The trial judge was right to reject the prosecution's 'last seen together' theory to infer guilt on the respondents. There was no clear evidence to show that the respondents were, in fact, last seen with the deceased. The mere fact that they lived in the same house with the deceased was in itself insufficient to connect them to his death. There was no direct or circumstantial evidence to show that the respondents had caused the deceased's death. For the same reasons, the trial judge had rightly rejected the prosecution's contention that the respondents had the 'opportunity to commit the crime'. Opportunity alone could not be the basis to convict the respondents in the absence of any cogent evidence that established their guilt beyond reasonable doubt (see paras 62–64, 69 & 71).

(4) The prosecution conceded that it had not tendered any cogent evidence of motive on the part of any of the respondents to kill the deceased. The alleged financial motive, the deceased's alleged intention to divorce the first respondent and the deceased's alleged bad relationship with the second and third respondents relied on by the prosecution to show motive was nothing more than mere speculation. The prosecution was unable to produce a coherent case theory as to how the death happened, what the motives were and a logical/reasonable theory as to how the respondents were involved in the death of the deceased (see paras 76 & 84).

(5) The trial judge erred in finding that no blast or explosion had occurred. This finding went against PW46's finding that there were blast injuries on the deceased's body bearing the pattern of shrapnel injuries in keeping with blast injuries. The trial judge failed to explain why he disregarded PW46's evidence in this regard. The preponderance of evidence showed that there was a blast or explosion in the room, though the witnesses were not certain as to what might have caused it. The trial judge had failed to scrutinise and consider all the evidence and weigh the probabilities before concluding that there was no blast. This lack of judicial appreciation of the evidence was a misdirection that warranted appellate correction (see paras 91 & 93–94).

(6) The trial judge erred in finding that the fire in the bedroom was deliberately caused with the use of petrol. This finding was primarily based on the evidence of the fire department's science officer, PW14, who said that she found traces of petrol in some of the samples taken from the bedroom. However, similar analysis by the Chemistry Department did not find any traces of petrol, and that evidence was corroborated by PW41, PW42, PW46 and his team of doctors (who confirmed that the deceased's body had no smell of petrol) and by the handlers of the K9 unit sniffer dogs. The trial judge failed to explain why he chose to accept PW14's evidence, when her testing and analysis did not conform to accepted standards, over that of the Chemistry Department's analysis.

The analysis done by the Chemistry Department ought to be preferred as it was more objective and done in conformity with international standards. Reliance on PW14's flawed analysis was a misdirection (see paras 95–98).

(7) There was not an iota of evidence to establish common intention among the respondents to kill the deceased nor any evidence of a participatory act in furtherance of such a common intention (see para 104).

[Bahasa Malaysia summary

Responden-responden dalam Rayuan 282 telah dituduh bersama dengan orang lain yang masih bebas ('Eka') kerana membunuh seorang lelaki ('si mati') di rumahnya antara 11.30 malam pada 13 Jun 2018 dan 4 pagi pada 14 Jun 2018 dengan niat bersama menyebabkan kematiannya. Pada akhir kes pendakwaan, mahkamah perbicaraan memutuskan bahawa tiada kes prima facie berjaya dibuktikan dan melepaskan dan membebaskan responden tanpa memanggil untuk membela diri. Si mati adalah suami responden pertama dan mempunyai dua anak kecil. Responden kedua dan ketiga adalah anak-anak responden pertama daripada perkahwinan terdahulu. Kesemua mereka bersama-sama dengan pembantu rumah Indonesia mereka, Eka, tinggal di rumah yang sama yang terletak di kawasan berpagar dan mempunyai pengawal keselamatan. Sekitar sejam selepas si mati pulang ke rumah kira-kira jam 11.30 malam pada 13 Jun 2018, seorang jiran memaklumkan pengawal keselamatan terdapat asap tebal dari tingkat atas rumah si mati. Salah seorang pengawal keselamatan segera menghubungi bomba yang kemudiannya mendapati bahawa kebakaran telah berlaku di bilik tidur utama. Selepas memadamkan api, anggota bomba mendapati si mati terbaring di atas lantai dan mengalami kecederaan di kepalanya. Mereka juga menemui telefon bimbit yang terbakar di atas katil. Anjing penghidu dari unit K9 jabatan bomba dibawa ke tempat kejadian untuk membantu mengesan kehadiran sebarang bahan mudah terbakar. Ujian awal yang dilakukan oleh jabatan bomba ke atas sisa yang diambil dari bilik itu mengesan kesan petrol sebagai penyebab kebakaran. Walau bagaimanapun, analisis serupa yang dilakukan oleh Jabatan Kimia tidak menemui kesan petrol. Bedah siasat pertama ke atas si mati yang dijalankan oleh pakar patologi forensik (PW46) di Hospital Kuala Lumpur mendapati bahawa si mati telah meninggal dunia akibat 'komplikasi letupan dan kecederaan alat tumpul yang menembusi'. PW46 berpendapat bahawa alat tumpul seperti tukul (tidak ditemui di tempat kejadian), boleh menyebabkan luka menembusi di kepala si mati yang merosakkan otaknya dan menyebabkan pendarahan yang teruk. PW46 menemui 16 kecederaan berbeza pada si mati — kebanyakannya seperti serpihan peluru — yang membawa kepada kesimpulan bahawa ianya mungkin disebabkan oleh letupan. Atas permohonan adik-beradik si mati, majistret membenarkan bedah siasat kedua dilakukan oleh pakar patologi forensik lain (PW50) selepas mayat digali empat bulan kemudian. PW50 memutuskan bahawa kematian itu disebabkan oleh

'pelbagai hentaman tumpul ke kepala'. Hakim perbicaraan berpendapat, antara lain, bahawa: (a) hentaman pada kepala si mati daripada alat tumpul menyebabkan kematiannya; (b) kecederaan itu sengaja ditimbulkan dan mencukupi dalam perjalanan biasa untuk menyebabkan kematian; (c) pihak pendakwaan telah gagal membuktikan bahawa responden yang menyebabkan kecederaan dan juga gagal membuktikan bahawa kematian itu berlaku dalam jangka masa yang dinyatakan dalam pertuduhan; (d) kebakaran di dalam bilik tidur adalah sengaja disebabkan oleh penggunaan petrol; (e) tiada letupan berlaku di tempat kejadian pada masa kejadian; and (f) siasatan polis terhadap kes itu tidak menyeluruh kerana tiada percubaan dibuat untuk menghubungi, menangkap, merakam kenyataan atau memanggil saksi pembantu rumah, Eka walaupun polis mengetahui keberadaannya. Oleh kerana responden dibenarkan membuat semua hujahan yang relevan semasa pendengaran rayuan pendakwaan, mahkamah mendapati rayuan responden adalah berlebihan dan membatalkannya secara terus.

Diputuskan, sebulat suara mengenepikan rayuan pendakwaan dan mengekalkan keputusan lepas dan bebas responden-responden:

(1) Pihak pendakwaan telah gagal membuktikan kes prima facie berkenaan pertuduhan terhadap responden-responden (lihat perenggan 110).

(2) Tiada alasan untuk mengganggu penemuan hakim perbicaraan bahawa pihak pendakwaan telah gagal membuktikan masa kematian si mati seperti yang dinyatakan dalam pertuduhan. Hakim perbicaraan betul ketika menolak kebergantungan pihak pendakwaan kepada keterangan PW50 pada masa kematian kerana: (a) bercanggah dengan laporan bedah siasatnya sendiri; (b) penemuannya bahawa si mati telah meninggal dunia antara 1.30 pagi dan 5.30 pagi pada 14 Jun 2018 dibuat pada jam ke-11 semata-mata berdasarkan gambar-gambar yang diberikan kepadanya dari awal; (c) PW46 yang berada dalam kedudukan yang lebih baik untuk menentukan masa kematian, tidak pernah disoal mengenai isu rigor mortis atau hypostasis dalam menentukan masa kematiannya; (c) PW46 sendiri memberi keterangan bahawa dia tidak dapat menentukan masa kematian walaupun menjalankan bedah siasat pertama pada tarikh kejadian; dan (d) PW50 mengakui bahawa rigor mortis dan hypostasis adalah petunjuk yang lemah untuk menentukan masa kematian terutamanya apabila rigor haba wujud (lihat perenggan 55–56).

(3) Hakim perbicaraan betul menolak teori 'terakhir dilihat bersama' pendakwaan untuk membuktikan kesalahan responden-responden. Tiada keterangan yang jelas yang menunjukkan bahawa responden-responden terakhir dilihat bersama si mati. Fakta bahawa mereka tinggal di rumah yang sama dengan si mati dengan sendirinya tidak mencukupi untuk mengaitkan mereka dengan kematiannya. Tiada

keterangan langsung atau keadaan yang menunjukkan bahawa responden-responden telah menyebabkan kematian si mati. Atas alasan yang sama, hakim perbicaraan telah menolak hujah pendakwaan bahawa responden mempunyai 'peluang untuk melakukan jenayah'. Peluang sahaja tidak boleh menjadi asas untuk mensabitkan responden dengan ketiadaan sebarang keterangan yang meyakinkan yang membuktikan kesalahan mereka melampaui keraguan munasabah (lihat perenggan 62–64, 69 & 71).

(4) Pihak pendakwaan mengakui bahawa mereka tidak mengemukakan sebarang keterangan motif yang kukuh oleh mana-mana responden untuk membunuh si mati. Motif kewangan yang didakwa merupakan niat si mati untuk menceraikan responden pertama dan hubungan buruk si mati dengan responden kedua dan ketiga yang dihujahkan oleh pihak pendakwaan untuk menunjukkan motif merupakan spekulasi semata-mata. Pihak pendakwaan tidak dapat mengemukakan teori kes secara kukuh tentang bagaimana kematian itu berlaku, motifnya dan teori secara logik/munasabah tentang bagaimana responden-responden terlibat dengan kematian si mati (lihat perenggan 76 & 84).

(5) Hakim perbicaraan terkhilaf apabila mendapati bahawa tiada letupan telah berlaku. Penemuan ini bertentangan dengan penemuan PW46 bahawa terdapat kecederaan letupan pada badan si mati yang menyerupai kecederaan serpihan peluru serupa dengan kecederaan letupan. Hakim perbicaraan gagal menjelaskan mengapa beliau mengabaikan keterangan PW46 dalam hal ini. Kebanyakan keterangan menunjukkan bahawa terdapat letupan di dalam bilik walaupun saksi tidak pasti penyebabnya. Hakim perbicaraan telah gagal meneliti dan mempertimbangkan semua keterangan dan menimbang kebarangkalian sebelum membuat kesimpulan bahawa tiada letupan berlaku. Kekurangan penilaian kehakiman terhadap keterangan ini adalah salah arah yang memerlukan pembetulan rayuan (lihat perenggan 91 & 93–94).

(6) Hakim perbicaraan terkhilaf apabila mendapati bahawa kebakaran di dalam bilik tidur sengaja disebabkan oleh penggunaan petrol. Penemuan ini terutamanya berdasarkan keterangan pegawai sains jabatan bomba, PW14 yang mengatakan bahawa dia menemui kesan petrol dalam beberapa sampel yang diambil dari bilik tidur. Walau bagaimanapun, analisis serupa oleh Jabatan Kimia tidak menemui sebarang kesan petrol dan keterangan itu disokong oleh PW41, PW42, PW46 dan pasukan doktornya (yang mengesahkan bahawa mayat si mati tidak berbau petrol) dan oleh pengendali anjing penghidu unit K9. Hakim perbicaraan gagal menjelaskan mengapa dia memilih untuk menerima keterangan PW14, apabila ujian dan analisisnya tidak mematuhi standard piawaian yang diluluskan berbanding analisis Jabatan Kimia.

Analisis yang dilakukan oleh Jabatan Kimia harus diutamakan kerana ianya lebih objektif dan dilakukan menurut piawaian antarabangsa. Pergantungan pada analisis PW14 yang lemah merupakan satu kekhilafan (lihat perenggan 95–98).

(7) Tiada sedikit pun keterangan yang membuktikan niat bersama di kalangan responden untuk membunuh si mati atau sebarang keterangan mengenai penyertaan untuk meneruskan niat bersama (lihat perenggan 104).]

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)
Ahmad Najib bin Aris v PP [2007] 2 MLJ 505, CA (refd)
Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Aizat Abdullah bin Othman v PP [2023] 2 MLJ 186, CA (refd)
Ashok v State of Maharashtra 2015 (4) SCC 393, SC (refd)
Aziz bin Muhamad Din v PP [1996] 5 MLJ 473; [1997] 1 CLJ SUPP 523, HC (refd)
Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia Tenaga Nasional Bhd [2015] 5 MLJ 52; [2015] 7 CLJ 849, CA (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101, FC (refd)
Dato' Sri Mohd Najib bin Hj Abd Razak v PP [2022] 1 MLJ 137; [2022] 1 CLJ 491, CA (refd)
Eu Lim Hoklai v PP [2011] 3 SLR 167, CA (refd)
Irfan @ Naka v The State of Uttar Pradesh (Criminal Appeal Nos 825–826 of 2022) (unreported), SC (refd)
Kanhaiya Lal v State of Rajasthan 2014 AIR SCW 1828, SC (refd)
Ling Hang Tsyr v PP [2019] MLJU 1182; [2019] 1 LNS 1573, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mickelson Gerald Wayne v PP [2022] 6 MLJ 118; [2021] 10 CLJ 700, FC (refd)
Nur Fatihah Saqira bt Mohd Tahir lwn Pendakwa Raya dan satu lagi rayuan [2022] 6 MLJ 210; [2022] 1 LNS 1939, CA (refd)
Pathmanabhan a/l Nalliannen v PP and other appeals [2017] 3 MLJ 141, FC (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161, FC (refd)
PP v Ho Sek Kong [2006] 2 MLJ 81, HC (refd)
PP v Jasendran a/l Sanmugam [2020] MLJU 1193; [2020] CLJU 1540; [2020] 1 LNS 1540, HC (refd)
PP v Letchumanan a/l Krishnan [2008] 3 MLJ 290, HC (refd)
PP v Musdar bin Rusli [2017] 5 MLJ 628; [2017] 7 CLJ 703, CA (refd)
PP v Roslizam bin Abdul Azis & Anor [2005] 1 MLJ 261, HC (refd)

A *PP v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184; [1998] 6 CLJ 609, HC (refd)
PP v Gerardine Andrew [1998] 3 SLR 736, CA (refd)
Rajamorgan a/l Marimuthu v PP [2014] 5 MLJ 565; [2014] 6 CLJ 850, CA (refd)
B *Rakesh Kumar a/l Thangagrajoo lwn Pendakwa Raya dan satu lagi rayuan* [2017] MLJU 618; [2017] CLJU 502, CA (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37, CA (refd)
Sujit Biswas v State of Assam 2013 AIR SCW 3281, SC (refd)
Virsa Singh v State of Punjab 1958 SCR 1495, SC (refd)
C

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Criminal Procedure Code s 180
Penal Code ss 34, 300, 300(a), (b), (c), (d), 302
D

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Vazeer Alam JCA (delivering judgment of the court):

F INTRODUCTION

[1] There are two appeals before us. One by the prosecution and the other by the defence.

G **[2]** The Appeal No B-05(LB)-282–06 of 2022 ('Appeal 282') concerns the prosecution's appeal against the decision of the High Court in acquitting and discharging all three respondents on grounds that the prosecution had failed to prove the third element of the offence of murder, ie whether the respondents had caused the injuries which resulted in the deceased's death. Whilst, Appeal
H No B-05–293–07 of 2022 ('Appeal 293') is confined to the defence's appeal against certain findings made by the High Court in relation to the second element of murder as to whether the deceased's death was caused by the injuries inflicted on him.

I BACKGROUND FACTS

[3] The respondents, together with another person still at large, were jointly charged with an offence of murder punishable under s 302 of the Penal Code. The charge read as follows:

Bahawa kamu bersama-sama dengan seorang lagi yang masih bebas, iaitu Eka Wahyu Lestari (No Passport Indonesia AT 752298), di antara jam 11.30 malam, 13 Jun 2018 dan jam 4.00 pagi, 14 Jun 2018 di rumah No 12A, Jalan PJU 7/24A, Mutiara Homes, Mutiara Damansara, di dalam daerah Petaling Jaya, di dalam Negeri Selangor, bagi mencapai niat bersama, kamu telah melakukan pembunuhan dengan menyebabkan kematian ke atas Nazrin bin Hassan (No KP: 731030–10–5065) dan oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama-sama seksyen 34 Kanun yang sama.

[4] The trial proceeded against the respondents in the absence of the fourth co-accused, Eka Wahyu Lestari ('Eka'). The learned trial judge acquitted and discharged all the respondents at close of prosecution's case on grounds that the prosecution had failed to prove a prima facie case.

[5] This resulted in the prosecution filing Appeal 282 and the defence filing Appeal 293.

SUMMARY OF THE PROSECUTION'S CASE

[6] The prosecution's case, based on the evidence before the High Court, can be summarised as follows:

(a) the first respondent, Samirah bt Muzaffar ('Samirah') is the wife of the deceased, Nazrin bin Hassan. Both the second respondent, Haziq Aiman bin Nizam Mydin ('Haziq') and the third respondent, Naufal Aalif bin Nizam Mydin ('Naufal') are Samirah's sons from a previous marriage. Thus, Haziq and Naufal were the deceased's step-sons. All three respondents and the deceased lived in the same house at No 12A, Lorong PJU 7/24A, Mutiara Damansara, Selangor Darul Ehsan, situated within a gated and guarded community known as Mutiara Homes ('the family home'). The fourth co-accused, an Indonesian national, worked as their live-in house maid in the family home. Samirah had two other young children from her marriage to the deceased, who also lived in the family home;

(b) during Ramadan at about 11.30pm on 13 June 2018, the deceased was dropped off by his driver, Muhammad Nabil Faqih bin Abd Rahim (PW28), at the family home;

(c) the following day, on 14 June 2018 at about 12.24pm, one of Samirah's neighbours noticed thick smoke bellowing out from the top floor of the family home and immediately alerted one of the security guards of Mutiara Homes, namely, Pandit Raju Kumar (PW4);

(d) upon reaching the family home, PW4 saw smoke emanating from the upper floor. PW4 immediately made a call to the Fire and Rescue

Department ('FRD') to alert them of the fire. Upon entering the house, it was clear to PW4 that fire had broken out inside the master bedroom upstairs. PW4 attempted to open the master bedroom door but it was locked. PW4 was given an iron chisel by a neighbour and he subsequently broke the door down and saw smoke engulfing the interior of the room. Samirah attempted to rush into the room but was pulled back by PW4 as the room was already dangerously engulfed in thick smoke;

(e) a team of FRD officers comprising Tan Hoss bin Bah Agem (PW13), Mohamad Afzan bin Majid (PW9), Muhammad Reza bin Rosli (PW10), Stanley Sigau Nyalang (PW11), Mustafa and Rizalman (the latter two not called as witnesses), arrived at the family home at around 12.46pm and put out the fire in about two minutes. A large amount of water was utilised from the fire-hose sprays. Having entered the room, the FRD officers found a dead body on the floor, later identified as the deceased. PW9 stated that the deceased was a victim of fire and had sustained injuries on his head. At about 1.13pm, Dr Nur Sharafaradila bt Shamsul Anuar (PW26) examined the body and confirmed the death of the deceased;

(f) at about 2.10pm, the FRD Forensics Officer, Abdul Halim bin Zulkefli (PW15) arrived at the family home. Upon entering the master bedroom, PW15 saw the deceased lying on the floor in between the bed and the baby cot facing upwards but in a position inverse to that of the bed, ie legs towards the headboard. PW15 had also observed that the deceased had sustained several noticeable injuries on his head and chest. PW15 also found a burnt Blackberry handphone (P81A) on the bed;

(g) at about 3pm on 14 June 2018, the Selangor FRD Investigation Officers led by one Ahmad Subhaan (PW51) arrived at the family home with K9 sniffer dogs and their 3 handlers (not called as witnesses nor offered to the defence). PW15 and his team collected several samples of fire residue found on the deceased's chest (marked as 'A'), a burnt BlackBerry handphone on the bed (marked as 'B'), fire residue around the deceased's head (marked as 'C'), and fire residue on the mattress of the bed near the burnt BlackBerry handphone (marked as 'D');

(h) the K9 unit dogs were let loose to sniff in and around the master bedroom for the presence any combustible agent such as petrol. However, they did not detect any such substance. Upon concluding their investigation in the evening of 14 June 2018, the FRD investigation team released the house, including the master bedroom, back to Samirah;

(i) Police Inspector Anestassia Chin Fat (PW7), who was the first Investigating Officer assigned to this case arrived at the family home at

around 3pm. On her arrival, she met Samirah at the dining table downstairs and described her to be visibly sad. Following initial investigation, PW7 classified the case as sudden death;

(j) the deceased's body was then brought to Hospital Kuala Lumpur ('HKL') in a Police Land Rover accompanied by one Sargent Abdul Rahim bin Taha (PW33) where an autopsy was conducted at around 5pm by the first forensic pathologist, Dr Siew Sheue Feng (PW46). PW46 concluded the deceased's cause of death to be 'Complication of blast and blunt penetrating injuries'. At the material time, PW46 was the only pathologist intended for the deceased's pathological examination;

(k) the deceased was then interred at the Kota Damansara Muslim Cemetery on 15 June 2018;

(l) subsequently, on 16 and 19 June 2018, the FRD requested permission from Samirah to re-enter the master bedroom to conduct further investigations. Samirah willingly cooperated as evidenced by contemporaneous correspondence marked as exhs P68 and P69. On 16 June 2018, PW15 collected fire residues from the wall near the headboard of the bed (marked as 'E') and seized two packs of fireworks purportedly found in the TV cabinet (the defence contends however that sample E was taken on 19 June 2018). On 19 June 2018, during a subsequent visit, PW15 found and obtained a Huawei phone (marked as 'H') within the bed frame where the remnants of the burnt mattress had already been removed. He further collected extension wires, phone chargers, door handle (marked as 'G'), Huawei Mate 10 phone box and some medication found in the room;

(m) the fire residue samples taken from the master bedroom were brought to the FRD Forensics Laboratory where following laboratory tests the FRD Science Officer Aznor Sheda bt Samsudin (PW14), concluded that there were traces of petrol in samples 'C', 'D', and 'E'. There were, however, no traces of petrol found in sample 'A';

(n) following investigations led by FRD Officer Edwin Galak anak Teruki (PW20), and based on findings as in report dated 24 July 2018 (exh P34), the fire in the master bedroom was then categorised as an 'Incendiary Fire';

(o) on 3 August 2018, DSP Shamzury (not called as a witness) directed that the case be reclassified from 'sudden death' to 'murder' and assigned ASP Mohd Nizam bin Daud (PW57) as the Investigating Officer;

(p) on 19 September 2018 at around 12.50pm, ASP Mohd Nizam bin Daud (PW57) returned to the family home and carried out a reconstruction of the incident with the assistance of some FRD officers;

(q) the siblings of the deceased being dissatisfied with first post mortem and

the cause of death declared by the pathologist Dr Siew (PW46) applied to the magistrates court for an order to exhume the deceased's body for the purposes of conducting a second autopsy on the deceased. The magistrates court allowed the application and ordered the exhumation of the deceased's body, which was done on 8 October 2018;

(r) following the exhumation, a second post mortem examination was done by Dr Prashant Narseh Samberkar (PW50) from Universiti Malaya Medical Centre ('UMMC'). PW50 concluded in his report that the deceased's cause of death was due to 'multiple blunt impacts to the head' and handed over his autopsy report to PW57, the Investigations Officer; and

(s) on 4 March 2019, the respondents were jointly charged with an offence of murder under s 300 punishable under s 302 read together with s 34 of the Penal Code. The charge sheet however did implicate one other person, namely Eka, who, according to the Police, remained at large.

[7] After a lengthy trial of 57 witnesses, the learned trial judge found that the prosecution had failed to establish a prima facie case as required under s 180 of the Criminal Procedure Code, and accordingly acquitted and discharged all respondents without calling for their defence.

PRELIMINARY OBJECTION

[8] The prosecution raised a preliminary objection that the defence's Appeal 293 is incompetent, and that it is an abuse of process. The objection reads as follows:

> SILA AMBIL PERHATIAN bahawa Pendakwa Raya Malaysia sebagai Responden dalam rayuan ini akan membuat bantahan awal terhadap rayuan Perayu-Perayu yang merayu terhadap sebahagaian keputusan yang diberikan oleh Yang Arif Hakim Dato' Indera Haji Ab. Karim bin Ab. Rahman pada 21 Jun 2022 yang telah melepas dan membebaskan Perayu-Perayu di akhir kes pendakwaan bagi satu pertuduhan di bawah Seksyen 302 Kanun Keseksaan dan dibaca Bersama Seksyen 34 Kenun yang sama atas alasan rayuan tersebut adalah bertentangan dengan Seksyen 306 Kanun Tatacara Jenayah (Akta 593), Seksyen 316 Kanun Tatacara Jenayah (Akta 593), Seksyen 60 Akta Mahkamah Kehakiman (Akta 91) dan undang-undang Am serta penyalahgunaan proses Mahkamah (abuse process of the court).

[9] The prosecution's argument was essentially that since all three respondents were acquitted, they did not have the standing to lodge an appeal. Having considered the submissions of parties on the issue, we were of the view that the appeal lodged by the defence, ie Appeal 293, was redundant as this court in exercise of its appellate jurisdiction in considering Appeal 282 lodged by the prosecution is entitled to review and re-evaluate all available evidence and make its own conclusion in respect of any fact in issue. In the course of

opposing the prosecution's Appeal 282, the respondents were entitled to raise arguments against any and all aspects of the trial judge's findings that may lead to this court either affirming, reversing or varying the judgment or findings of the court below. In this regard, an appellate court has the power to make its own findings of fact and draw its own conclusions from the available evidence and applicable law. This would include making alternative inferences, conclusions or findings of fact and/or law whilst maintaining or affirming the ultimate decision of the High Court to acquit the respondents.

[10] This wide appellate power is provided in s 60(1) of the Courts of Judicature Act that reads:

> (1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other orders in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:
>
> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[11] A careful examination of s 60(1) of the CJA, shows that there a number of options available to the Court of Appeal in dealing with an appeal, and they may be summarised as follows:

(a) confirm the decision of the High Court;

(b) reverse or vary the decision of the High Court;

(c) order a retrial or remit the matter with the opinion of the Court of Appeal to the trial court; and

(d) make such other order in the matter as may seem just.

[12] This wide appellate power of the Court of Appeal to review or re-evaluate all available evidence was confirmed in the decision of this court in *Ahmad Najib bin Aris v Public Prosecutor* [2007] 2 MLJ 505 (CA), which was affirmed by the Federal in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 (FC), where it was held that:

> As regards the first main ground of appeal raised by the appellant, I am of the view that *the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution.* The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no

A reasons for the findings. *In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct* (see *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122) ...

B **[13]** Further, in *Aizat Abdullah bin Othman v Public Prosecutor* [2023] 2 MLJ 186, this court had said that it is open to the appellate court to determine if the various findings of the trial court are correct, meaning that the entire judgment and the reasoning contained therein were open to scrutiny. It is settled law that when an appeal comes before an appellate court, the appeal takes the form of a continuation of a trial and it is open to the appellate court C to determine if the various findings of the trial court are correct. See also *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579 (FC); *Nur Fatihah Saqira bt Mohd Tahir lwn Pendakwa Raya dan satu lagi rayuan* [2022] 6 MLJ 210; [2022] 1 LNS 1939 (CA).

D **[14]** Hence, we struck out Appeal 293 and proceeded to hear only Appeal 282. In so doing, we made a specific ruling to the effect that the respondents in opposing Appeal 282 were at liberty to raise arguments against any and all aspects of the learned trial judge's findings. Hence, in determining the prosecution's Appeal 282 as to whether the High Court had erred in deciding E that the prosecution had failed to prove a prima facie case, the Court of Appeal is entitled to review and re-evaluate all available evidence which includes the power to review whether the High Court was right in findings, both facts and law.

F THE LAW ON MURDER

[15] Murder is defined in s 300 of the Penal Code:

300 Except in the cases hereinafter excepted, culpable homicide is murder —

G (a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

H (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous I that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[16] The law is settled in that in order to establish a case of murder as in s

300, which is punishable under s 302 of the Penal Code, it is incumbent upon the prosecution to prove:

(a) the death of the deceased ('first element');

(b) the deceased's death was caused by injury or injuries inflicted on the deceased ('second element');

(c) the accused had caused the injury or injuries which resulted in the deceased's death ('third element'); and

(d) the act causing the death was committed with the mens rea under s 300(a), (b), (c) or (d) ('fourth element'), that is:

(i) the act is done with the intention of causing death;

(ii) it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(iii) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(iv) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is like to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

See: *Public Prosecutor v Musdar bin Rusli* [2017] 5 MLJ 628; [2017] 7 CLJ 703 (CA).

[17] In the present case, the prosecution had relied on s 300(c) of the Penal Code in order to prove the fourth element. ie the mens rea for murder. This reliance was confirmed in the prosecution's opening statement (exh P3). The scope of s 300(c) was considered by the Federal Court in *Mickelson Gerald Wayne v Public Prosecutor* [2022] 6 MLJ 118; [2021] 10 CLJ 700, where having referred to the Indian Supreme Court's judgment in *Virsa Singh v State of Punjab* 1958 SCR 1495, the court held that the crucial question as to whether the accused intended to cause the type of injury that was in fact caused must be considered by the trial judge, failure of which could lead to a miscarriage of justice.

THE HIGH COURT'S FINDINGS

[18] The High Court, in summary, made the following findings:

A The death of the deceased (first element)

[19] The fact that Nazrin bin Hassan, named in the charge, had passed away was not disputed. The deceased was positively identified by several witnesses. Thus, this element was fulfilled, and nothing turns on this.

B

The deceased's death was caused by injury or injuries inflicted on the deceased (second element)

C **[20]** The High Court found that the deceased's cause of death was due to blunt injuries or double blunt impact to the head caused by a blunt object like a hammer. The High Court further found that the fire was intentionally caused with the usage of petrol and that there was no blast at the scene caused by an exploding electronic device such as a phone or power bank.

D

[21] Based on the type and nature of the injury which was fatal, the probable weapon that caused the injuries and the manner in which the place was burnt showed that the perpetrator or perpetrators inflicted the injuries with intention. The injuries were such that the likelihood of death was high. Hence, E the High Court concluded that this fell under s 300(c) of the Penal Code, and that the second element was fulfilled.

The respondents/accused persons had caused the injury/injuries which resulted in the deceased's death (third element)

F

[22] The time of the offence stated in the charge is between 11.30pm on 13 June 2018 and 4am on 14 June 2018. In establishing the time of death, the prosecution relied solely on the testimony of Dr Prashant (PW50), the second pathologist, who was of the opinion that the time of death was between 1.30am G to 5.30am on 14 June 2018. This opinion was made solely based on rigor mortis of the body and hypostasis which PW50 surmised based on the time the deceased was certified dead at 1.30pm on 14 June 2018 and the photographs taken at 3.30pm on the same date. There were, however, contradictions in PW50's evidence, and the High Court was not convinced with his evidence. H Hence, the High Court held that the prosecution had failed to prove the time of the offence as stated in the charge and that the respondents were involved in or had caused the injuries to the deceased that resulted in his death.

[23] Further, in this case there were no direct or circumstantial evidence to I show the respondents had committed the offence. The High Court found that the prosecution's reliance on the last seen together theory, relied on by the prosecution, was merely based on an assumption which does not amount to proof. In raising the last seen together theory the prosecution must show some connection between the respondents and the crime. The mere fact that they

were last seen together with the deceased was not in itself sufficient to connect the respondents to the offence. Further, the High Court found in relation to the at-large fourth co-accused, Eka, that the Investigations Officer (PW57) was not serious in pursuing the case towards her, to call her as a witness or to record her statement. And that this was indicative of the fact that the prosecution were themselves unsure as to the real perpetrator behind the this entire incident, if indeed it was a murder.

[24] Additionally, the alleged conduct, animosity and motive of the respondents to commit the offence was woefully lacking in evidence.

[25] In conclusion, there was insufficient evidence to show that the injuries which resulted in the death of the deceased were caused by any or all of the respondents with common intention. As such, High Court held that the prosecution has failed to prove a prima facie case.

ISSUES RAISED IN APPEAL 282

[26] The High Court held that the prosecution had failed to prove the third element. The High Court's findings were premised on:

(a) the failure of the prosecution to prove the time of death to be within the time specified in the charge; and

(b) the last scene together theory relied on by the prosecution did not apply as there was no evidence to link the respondents to the offence.

[27] Hence, the prosecution's appeal relates to the High Court's finding that they had failed to prove the third element of murder as to whether the respondents had caused the injuries which resulted in the deceased's death. And, the respondents, whilst having been acquitted of the charge, are challenging some of the High Court's other findings in relation to the second element of murder as to whether the deceased's death was caused by the injuries inflicted on him. They are asking this court to review the evidence and findings of the High Court in that regard.

[28] The appellant raised several issues in the petition of appeal dated 3 March 2023 and contended that:

(a) the prosecution has successfully proven a prima facie case against the respondents;

(b) the time of death of the deceased as per the charge had been proven by the prosecution;

(c) the respondents were the people last seen with the deceased, and as such the prosecution was entitled to rely on the last seen together theory to

connect the respondents to the death of the deceased;

(d) the prosecution has presented evidence that the deceased's body had been moved and that it was a staged crime scene;

(e) the existence of blood spatter on the wall proves their case;

(f) the conduct of the respondents shows the respondents' connection with the deceased's death;

(g) the deceased and the respondents did not have a good relationship and this establishes motive; and

(h) the fire in the bedroom was deliberately set, ie an incendiary fire set with the use of petrol.

THE LAW ON APPELLATE INTERVENTION

[29] In considering the arguments advanced by the appellant in respect of the several issues raised in this appeal, we have reminded ourselves of our appellate role. This court has in *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2022] 1 MLJ 137; [2022] 1 CLJ 491 restated the duty and function of the appellate court as follows.

> [63] The duty and function of an appellate court when hearing and determining a criminal appeal is well laid down by high authority. In *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557; [1996] 3 CLJ 187, Gopal Sri Ram JCA (later FCJ) explained the principle in the following terms:
>
> > In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
> >
> > In *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39–40):
> >
> > > ... we gave leave because firstly we felt that there was no proper appraisal of *Shea Swarup v King-Emperor AIR* [1934] PC 227 and secondly purporting to follow Terrell Ag CJ in *R v Low Toh Cheng* [1941] 1 MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.
> >
> > With respect, what Lord Russell of Killowen said in *Shea Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give proper weight and consideration to such matters' as:

(1) the views of the trial judge on the credibility of the witnesses;

(2) the presumption of innocence in favour of the accused;

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955] AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 that:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused'. Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v Thomas*). On the facts of this case we do not think so.

In *Wilayat Khan v State of Uttar Pradesh* AIR [1953] SC 122 at pp 123 and 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

> Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end; the second is that great weight should be attached to the view taken by the Sessions Judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.
>
> Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts.

This principle was reiterated by Haidar Mohd Noor FCJ (later CJM) in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193; [2002] 3 CLJ 457, where the Federal Court noted:

> It is an established principle that an appellate court should be slow to disturb the finding of facts of the lower court especially here where there are concurrent findings of facts by two courts namely the High Court and the Court of Appeal. Unless it can be shown that the finding of facts are not supported by the evidence

or it is against the weight of evidence or that it is a perverse finding it is not for us to disagree.

Though there are no concurrent findings, and the findings on appeal are only that of the High Court, nevertheless, the principle is that when it comes to findings of facts by the trial judge, the appellate court would be slow to disturb those findings, unless the findings are perverse, unsupported by evidence, or go against the weight and grain of evidence.

In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, Gopal Sri Ram JCA (later FCJ) speaking for the Court of Appeal summarised the principle and said that it is not the place of the appellate court to make its own findings of fact:

Now, it is settled law that it is no part of the function of an appellate court in a criminal case or indeed any case — to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lack the audio-visual advantage enjoyed by the trial court.

Then in *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875; [2014] 7 CLJ 897 the Court of Appeal speaking through Mohd Zawawi Salleh JCA (now FCJ) held:

[4] We have heard learned counsel for the appellants and learned deputy public prosecutor ('DPP') at some length. We have also scrutinised the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions.

Where:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4

MLJ 149; [2012] 1 LNS 1416 (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

These pronouncements of the law are binding precedents for this court to follow. Though the principle is that the appellate court should be slow to disturb or interfere with the factual findings of the trial court, that does not, however, fetter the appellate court from scrutinising the findings and the circumstances leading to the findings of fact to ascertain if there are any compelling reasons for disagreeing with those findings. This rider to the general principle was reaffirmed by the Federal Court in *Dato' Seri Anwar Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737, in the following words:

> Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh*'s case 'there are substantial and compelling reasons for disagreeing with the finding'. Otherwise, no judgment would ever be reversed on question of fact and the provision of s 87 of the CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

And in the final analysis, the duty of the appellate court hearing a criminal appeal is to ascertain if the conviction is right and that it is safe for the conviction to stand. This was reaffirmed by the Court of Appeal in *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409; [2005] 1 CLJ 389, where the court held that in a criminal appeal:

> Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe. See *Mohammad Hussain v Emperor* AIR 1945 Nag 441; *Zahari bin Yeop Baai v Public Prosecutor* [1980] 1 MLJ 160; [1977] 1 LNS 162.

Based on the principles stated in the cases mentioned above, it can be concluded that the court hearing the appeal is ordinarily not to disturb findings of fact, however it is obliged to interfere with a trial court's factual findings if it is found that the trial court had misdirected itself in some way, or if there are substantial and compelling reasons for disagreeing with the findings, or if the finding of fact is plainly wrong. It is also a well-established principle that in exercising its appellate jurisdiction, this court is not constrained from re-evaluating the whole of the evidence that has been presented at the prosecution and defence stages. In re-evaluating the whole of the evidence, the court has to evaluate the defence presented by the appellant in totality with the evidence adduced through the prosecution witnesses.

[30] The common thread running through in the above case authorities is that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the

primary task of evaluation of the evidence. However, the appellate court will intervene to rectify any error so that injustice is not occasioned in situations where:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned.

[31] In deciding this appeal, we have taken heed of these well-established principles of appellate intervention in considering the issues raised by the learned deputy appearing for the appellant and learned counsel appearing for the respondents; and were guided by the principle that in a criminal appeal, the duty of the appellate court is to consider whether the conviction is right and safe.

Whether prima facie case has been established?

[32] The prosecution contends that the finding of the High Court that a prima facie case has not been established against the respondents, or any one of them, is erroneous. It is a well-established principle of law that the burden of proof at the end of the prosecution's case to establish a prima facie case lies with the prosecution before the court is allowed to call the accused to defend himself as required under s 180 of the Criminal Procedure Code.

[33] The law on what constitutes a prima facie case is well settled. A prima facie case is one where the prosecution has adduced sufficient credible evidence proving each of the ingredients or elements of the offence which, if not rebutted or explained, would justify a conviction of the accused. The Federal Court in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 clarified this legal requirement at the end of the prosecution's case in the following terms:

In dealing with the question as to the position of the law at the end of the prosecution's case and the steps to be taken by the trial judge, useful reference may be made to the judgment of this court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 where the following pronouncements were made:

(a) in deciding whether a prima facie case has been established under the new s 180 of the CPC, a maximum evaluation of all the evidence adduced by the prosecution must be done and a prima facie case is one that is sufficient for the accused to answer, and the evidence adduced must be such that it can only be surmounted by evidence in rebuttal'

(b) if the evidence is unrebutted, and the accused remains silent, he must be convicted. Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain silent, which if answered in the affirmative, means that a prima facie case has been made out (c) Whenever the accused has chosen to remain silent, there is no necessity to re-evaluate the evidence to determine whether there is a reasonable doubt in the absence of any further evidence.

[34] Another feature of this case is that the prosecution relied solely on circumstantial evidence. In that regard, It is trite law that where circumstantial evidence is the basis of the prosecution's case, the evidence must be considered as a whole and the collective evidence must irresistibly point to one and only one conclusion, the guilt of the accused. The learned trial judge alluded to this in his judgment at para [32]:

[32] Dalam kes yang bergantung hanya kepada keterangan ikut keadaan, tugas pihak pendakwaan adalah lebih berat yang mana keterangan yang dikemukakan hendaklah secara kumulatifnya hanya menjurus kepada satu kesimpulan akan kebersalahan Tertuduh dan dua orang kanak-kanak tersebut (kes *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ Rep 101; *Jayaraman v Public Prosecutor* [1982] 2 MLJ 237 dan *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579). Keterangan ikut keadaan tidak boleh bergantung kepada satu hapotisis, teori mahupun spekulasi dan syak. Ia mesti memberi satu inferen yang kukuh akan kebersalahan mereka.

[35] Indeed, circumstantial evidence does not depend on hypothesis, or theories, or even speculations. The court has to take caution that it does not rely upon conjectures or suspicion and the same should not be permitted to take the place of legal proof. The factual circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. They must give rise to strong inferences so as to become the best evidence (see: *Public Prosecutor v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184; [1998] 6 CLJ 609 (HC)). It is not the quantity of circumstantial evidence that the court looks at, rather the quality of that evidence (see: *Public Prosecutor v Ho Sek Kong* [2006] 2 MLJ 81 (HC)).

[36] The Federal Court in *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2008] 3 MLJ 161, in concurring with the Court of Appeal's view on circumstantial evidence, observed:

> Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope (see *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307). There is insufficient evidence to connect the respondent with the killing. Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all (see *Idris v Public Prosecutor* [1960] 1 MLJ 96).

[37] Now, with these principles of law in mind let us examine the prosecution's case. As stated earlier, for an offence of murder under s 300 punishable under s 302 of the Penal Code, there are several elements of the offence that the prosecution needs to prove in order to establish a prima facie case. We shall look at them now and examine how the learned High Court judge dealt with them.

The first element

[38] We agree with the learned trial judge that the prosecution had established the first element of the offence, ie that the deceased as stated in the charge is Nazrin bin Hassan. In any event, the fact that Nazrin bin Hassan, the husband of the Samirah was found dead in the bedroom of the family home was not disputed.

The second element

[39] As for the second element, ie that the deceased's death was caused by injury or injuries inflicted on the deceased, the prosecution relied on the expert evidence of two pathologists, ie PW46 (Dr Siew) and PW50 (Dr Prashant Sanbeker), who both confirmed that the injury that led to the death of the deceased was the 'penetrating wound measuring 5 x 4cm at the left parietal region' of the head. This injury caused damage to the brain which then caused severe bleeding which led to the deceased's death. The learned High Court judge found that both pathologists were of the same view that the injury was caused by a blunt object. The learned High Court judge's analysis of the evidence of PW46 and PW50 can be found at paras 36–44 of the High Court's judgment.

[40] There were however significant differences between the findings and opinions of PW46 and PW50, in that over and above this fatal head injury

caused by blunt trauma, PW46 also noted that the cause of death was due to a combination of blast related injury and blunt force trauma to the head. However, the learned trial judge did not accept PW46's opinion that it was a combination of blast and trauma that caused the death as he ruled out blast. We will deal with this finding in due course.

[41] The learned High Court judge was of the view that both pathologists (PW46 and PW50) were credible witnesses. However, the learned judge accepted and rejected some of their evidence after comparing and evaluating their evidence with that of other witnesses and other circumstances of the case. Such an approach is permitted in law. The Court of Appeal in *Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia Tenaga Nasional Bhd* [2015] 5 MLJ 52; [2015] 7 CLJ 849 reiterated this in the following words:

> [40] In our view, when expert opinions are in conflict with one another the court is obliged to assess the evidence and accept if necessary the most reliable parts in forming its decision (see *Mohamed Ismail Mohamed Shariff v Zain Azahari Zainal Abidin & Ors* [2013] 2 MLJ 605; [2013] 2 CLJ 717). In that process the court may put relevant questions to the expert for the purposes of clarification or eliciting further information (see *Lim Teck Kong v Dr Abdul Hamid Abdul Rashid & Anor* [2006] 3 MLJ 213; [2006] 1 CLJ 391).

[42] The learned trial judge concluded that since both PW46 and PW50 were of the view that the head injury to the deceased was sufficient in the ordinary cause of nature to cause death, the prosecution had proved the second element that the death of the deceased was caused by the injury to his head. Both PW46 and PW50 confirmed that the injury that led to the death of the deceased was the first injury at the left side of the deceased's head which was the 'penetrating wound measuring 5 x 4cm at the left parietal region'. This injury caused damage to the brain which then caused severe bleeding which led to the deceased's death. According to the learned High Court judge both pathologists were of the same view that the injury was caused by a blunt object and held that the cause of death of the deceased was due to blunt injuries or double blunt impact to the head caused by a blunt object like a hammer. However, the respondents' dispute this finding of the learned trial judge and contend that there were fundamental differences between PW46 and PW50 as to the cause of death. Learned counsel for the respondents submitted that the cause of death stated by Dr Prashant (PW50) was blunt force trauma to the head, however, Dr Siew (PW46) concluded that the cause of death was due to 'complications of blast and blunt penetrating injuries'. Now, how these injuries came to be inflicted or suffered by the deceased is a point of contention.

[43] Learned counsel for the respondents submits that this finding of the High Court was arrived at without proper judicial appreciation of the overall evidence. Counsel contends that Dr Siew (PW46) had stated with reservation

that whilst a blunt object, such as a hammer, could cause the skull fracture and head injury, a hammer could not cause the track in the brain as well as the blast type pattern of injury on the deceased's body. PW46 reiterated this a few times. And crucially, Dr Siew (PW46) went further to explain that the fatal injury did not have the impact or effect of an injury by a hammer. He noted that this fatal injury was very different. PW46 said that if the head is struck by something like a hammer, there will be contusion to the brain substance, however, the deceased's head injury was different and had just a cut.

[44] Further, in relation to the shape of fracture found on the skull, Dr Prashant (PW50) was of the view that it was consistent with two impacts by a hammer. However, in cross-examination, Dr Prashant (PW50) was shown the photos of the skull taken during the first post mortem done by Dr Siew and he agreed that the shape was triangular and not circular. PW50 further agreed that it was not consistent with the shape of a hammer blow injury. PW50 then agreed that the hole he found at the point of time he did his post mortem, which was four months after the first post mortem, was drastically different in shape.

[45] Dr Siew (PW46) in his post mortem report stated that the deceased had complication of blast and blunt penetrating injuries. PW46 noted 16 different injuries, namely:

(a) penetrating wound, measuring 5 x 4cm at left parietal region. This wound torn the scalp and was associated with a comminuted depressed fracture of the left parietal bone. The broken bone pieces were pushed into the left side of cranium and tom dura matter. A small piece of bone perforated the left cerebral hemisphere and found in the inter-hemispheric fissure;

(b) penetrating wound, measuring 4 x 3cm at anterior half of mid parietal region;

(c) penetrating wound, measuring 2 x 1cm at right side of central forehead. This wound had torn the skin, subcutaneous tissues, and broken the underlying frontal bone. No foreign body was found;

(d) penetrating wound, measuring 3 x 2cm on left side of central forehead. This wound torn the skin, subcutaneous tissues, and broken the underlying frontal bone. No foreign body was found;

(e) a small penetrating wound punctured the lateral aspect of left eye. This wound was associated with left temporal subconjunctival haemorrhage, fracture of left orbital plate and left periorbital haematoma measuring 4.5 x 3.5cm;

(f) an oblique tangential laceration, measuring 4 x 1cm at left cheek. This

wound torn the skin and subcutaneous tissues;

(g) an oblique laceration, measuring 0.5 x 3cm at left parotid area. This wound torn the skin and subcutaneous tissues;

(h) superficial penetrating wound, measuring 2 x 1cm at ramus of left mandible. This wound torn the skin and subcutaneous tissues. No foreign body was found;

(i) penetrating wound, measuring 2 x 1cm at anterior half of right parietal region. This wound torn the skin, subcutaneous tissues, and broken the right parietal bone and right orbital plate. No foreign body was found;

(j) a group of penetrating wounds, approximately six in number at the mid facial area, varying from 0.5 x 0.3 to 0.3cm x 0.2cm. These wounds broken underlying bones. No foreign body was found;

(k) penetrating wound, measuring 2 x 1.5cm at upper half of the front of neck. This wound had torn the skin and subcutaneous tissues. No foreign body was found.

(l) bruise, measuring 2 x 1.5 cm at the outer half of left shoulder;

(m) a tangential penetrating wound, measuring 3 x 1cm at medial end of left shoulder. This wound torn the skin and subcutaneous tissues;

(n) an oblique tangential penetrating wound, measuring 4 x 1cm at medial half of left clavicle. This wound torn the skin and subcutaneous tissues;

(o) penetrating wound, measuring 1 x 1cm at left parasternal area. This wound torn the skin and formed a track in the subcutaneous tissues. No foreign body was found; and

(p) penetrating wound, measuring 1 x 1cm at the back of proximal half of left hand. This wound had torn the skin and subcutaneous tissues. No foreign body was found.

[46] Dr Siew (PW46) went further to explain that the fatal injury did not have the impact or effect of an injury by a hammer. The fatal injury which he observed was very different as if it was hit by something like hammer, there will be contusion to the brain substance. However, PW46 found that the fatal injury on the deceased was different and had just a cut. Further, Dr Siew (PW46) testified that there were different forces to the injuries on the skull which were inconsistent with only a blunt injury. PW46 reiterated that the pattern of injury was inconsistent with just a blunt injury. He emphasised that considering the totality of the 16 different injuries, they were consistent with blast injury and only this would be able to explain all the injuries that were found on the deceased, including the fatal head injury. In his examination-in-chief, PW46 said:

DPP: Does this form part of the finding on blast injury?

SP46: We found an injury pattern before the blunt injury. It is very obvious all over the body. We found some tracks which we are not able to understand why the blunt injury is forming tracks. We don't see any foreign bodies.

PW46 further testified as follows:

DPP: So your finding of complication of blast and blunt injury. Blast and blunt injury, it should be read conjunctively?

SP46: It depends. If there was a blast, I can explain all these things but it needs a more powerful device. Everything fits. But you said no blast, how to explain this track on the body and that is the difficulty on that. I am still unable to form a convincing cause of death because the information that was given to me was very scanty and I am unable to link. The type of the information is one time we cannot make conclusions so far on that and you cannot convince how to explain all the tracks with the blunt object. You must have a different blunt object to answer this the track on the eyes, the track here. There was a lot that cannot answer on that.

[47] Hence, Dr Siew's steadfast view was that all the injuries cannot be caused by a blunt object such as a hammer, and that there must have been a blast. Dr Siew (PW46) as the pathologist who received the fresh body stressed the importance to identify and explain all 16 injuries found. PW46 was able to identify each and every injury and wound, and the only plausible explanation for the blast type injuries was that there must have been a blast. And in contrast, Dr Prashant (PW50) had taken the approach of just focusing on the fatal head injury and refused to probe further in relation to the other injuries, most which he was unable to find or investigate due to decomposition of the body. PW50 was also unable to make observations that Dr Siew (PW46) was generally able to make shortly after the deceased's death, where the condition of the body and injuries were still fresh. Thus, whilst both PW46 and PW50 were of the view that the fatal injury that caused the deceased's death was the blunt force injury to the head, there is a marked difference between the two as to what caused that injury. PW50 is of the opinion that it was a blunt force injury caused by a tool such as a hammer. However, no hammer was recovered. PW46 on the other hand is of the opinion, based on the nature of the overall injury on the deceased's body, that cause of the injury is a combination of blast and blunt force trauma to the head. The learned trial judge had rejected PW46's opinion of a blast based on the views expressed by a blast expert called by the prosecution who testified at trial to the effect that there is no evidence of any electronic device, such as a mobile phone or a power bank exploding in the room. Now, if that were so, then how do we explain the unchallenged evidence of PW46 that most of the 16 injuries that he noted very soon after the deceased's death were consistent with blast injury. The lack of explanation for these injuries does not help the prosecution's case and creates a large gap in their case. We will revisit this issue when analysing the trial court's findings as regards the third element.

Third element

[48] Now, as to the third element of the offence, ie whether the respondents had caused the injury which resulted in the deceased's death, the learned trial judge found that the prosecution had failed to establish this crucial element of the offence.

Time of death

[49] The prosecution submitted that the time of death is between 11pm on 13 June 2018 and 4am on 14 June 2018, as stated in the charge. The learned trial judge considered this issue in some detail in paras 107–115 of his judgment particularly by reference to the evidence of the two main medical experts, namely PW46 and PW50, before definitively concluding that the prosecution had failed to prove this all-important of element of the offence:

> [107] Bagi memutuskan sama ada tertuduh dan tiga yang lain dalam pertuduhan yang melakukan perbuatan tersebut, ia amat berkait rapat dengan masa berlakunya kematian. Dalam pertuduhan terhadap ketiga-tiga mereka yang dibicarakan ini, pihak pendakwaan secara khusus menuduh pembunuhan itu berlaku di antara masa-masa 11.30 malam pada 13 Jun 2019 dan 4 pagi pada 14 Jun 2018.
>
> [108] Telah mahkamah ini katakan bahawa dalam keadaan kes yang mana pihak pendakwaan bergantung kepada keterangan ikut keadaan maka tugas mereka adalah lebih berat dalam membuktikan pertuduhan tersebut sehingga tidak ada apa inferen yang boleh dibuat kecuali hanya satu yang berpihak kepada pihak pendakwaan.
>
> [109] Masa kematian adalah penting bukan sahaja sebagai satu perkara yang mesti dibukti sebagaimana dakwaan dalam pertuduhan, bahkan ia akan menunjukkan siapa yang berada bersama si mati pada waktu si mati masih hidup dan seterusnya mati dan seterusnya boleh mengaitkan mereka yang melakukan kematian atau pembunuhan tersebut. Dalam kes jenayah tugas membuktikan setiap perkara penting dalam membuktikan pertuduhan terhadap tertuduh sentiasa terletak di bahu pihak pendakwaan. Bukannya tugas tertuduh untuk membuktikan tentang atau membuktikan sebaliknya akan apa-apa fakta, bahkan ia cukup untuk membebaskan tertuduh jika sesuatu fakta yang membentuk pertuduhan itu tidak dibuktikan oleh pihak pendakwaan (kes *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 dirujuk).
>
> [110] Pihak pendakwaan dalam membuktikan masa kematian si mati ini bergantung sepenuhnya kepada keterangan Dr Prashant (SP50) yang berpendapat masa-masa kematian si mati di antara 1.30 hingga 5.30 pagi pada 14 Jun 2018. Pendapat dan dapatan SP50 ini adalah berdasarkan keadaan kaku mayat yang telah berlaku dan keadaan *post mortem lividity* (*hypotasis*) yang terjadi di antara 8 hingga 12 jam dengan mengambil kira si mati disahkan mati pada jam 1.30 petang 14 Jun 2018 tersebut dan gambar si mati yang dirakamkan pada 3.30 petang itu.
>
> ...

A [113] Setelah menyebut sedemikian dapatan SP50 mengenai masa kejadian kematian si mati antara 1.30 pagi hingga 4 pada 14 Jun 2018 adalah bertentangan dengan keterangan dirinya sendiri dan tidak begitu tegas serta tidak menyakinkan mahkamah ini dan tidak boleh diterima.

B [114] Waktu kematian seperti dalam pertuduhan itu juga tidak pernah dinyatakan oleh dan dibangkitkan kepada SP46 oleh pihak pendakwaan yang merupakan doktor pertama yang memeriksa secara fizikal jasad si mati sebaik saja si mati dijumpai mati. SP46 adalah doktor yang sebaiknya dan sewajar menyatakan waktu si mati mati secara spesifik.

C [115] Oleh itu, mahkamah ini dapati pihak pendakwaan telah gagal menunjukkan bahawa waktu kematian si mati atau pembunuhan atas si mati berlaku di antara masa jam 11.30 malam 13 Jun 2018 hingga 4 pagi 14 Jun 2018. Dengan itu, pihak pendakwaan gagal membuktikan tertuduh dan/atau KK1 dan/atau KK2 terlibat dengan atau melakukan pembunuhan terhadap si mati di antara masa-masa yang disebut dalam pertuduhan.

D

[50] To bring the death within the time specified in the charge, the prosecution was relying on the evidence of Dr Prashant (PW50) in his additional questions. This evidence was contrary to his own post mortem Report (P135 at p 18) that the deceased's time of death is between 11pm on E 13 June 2018 to 4am on 14 June 2018.

[51] The evidence shows that Dr Prashant's (PW50) opinion as to the time of death was only formed very much later (some 2 1/2 years after the second post mortem and his post mortem report) when he had a meeting with the F prosecution several days before he came to court to testify. Such opinion was formed merely based on his observation of some of the photographs taken much earlier, despite the same already being in his possession before he wrote his post mortem report. Further, for the first time PW50 relied on rigor mortis and hypostasis, which were shown to be poor indicators of time of death, G especially when the body had undergone heat rigor.

[52] In fact, Dr Siew (PW46) who was in a more advantageous position to determine the time of death, could not determine the time of death. And interestingly, he was not asked by the prosecution on the use of rigor mortis and H hypostasis to determine the time of death.

[53] The contradictions in PW50's opinions and changing stance on the time of death can be seen from the chart below done by learned counsel for the I respondents, which succinctly summarises the learned trial judge's findings in this regard:

	2nd Post-Mortem Report (January 2019)	Witness Statement (Prior to July 2021)	Oral EIC (July 2021)	Cross-Examination (August 2021)	Re-Examination (August 2021)
Time of Death in general	Difficult to give opinion on time of death as the body was in advanced stage of decomposition	Same as 2nd PM Report	PW50 said time of death was between 1.30am to 6.30am on 14th June 2018	Based on photos & 1st PM Report [P111], PW50 agreed that it was **possible that the time of death was between 11.30am to 1.30pm on 14th June 2018**	Between **1.30 am and 5.30 am**
Using Hypostasis	Faintly appreciated on the back aspect of body	Same as 2nd PM Report	Using maximum hypostasis of bluish in colour: Between 1.30 am and 6.30 am	PW50 agreed that based on PW46's observation of **red hypostasis**, it gave an indication that the **time of death could not be before 11.30am on 14th June 2018**	Between **1.30 am and 5.30 am**
Using Rigor Mortis	Absent in all muscle group	Same as 2nd PM Report	Calculating 6 to 12 hours backwards using rigor mortis: Between 1.30 am and 6.30 am	PW50 also agreed that given the heat in the room, rigor mortis cannot be used to determine the time of death	Between **1.30 am and 5.30 am**

[54] Considering that Dr Siew (PW46) was the first pathologist to conduct a post mortem on the deceased's body soon after his death, PW46 would have been the best witness to have been asked to testify on rigor mortis and hypostasis. However, the prosecution did not ask PW46 any questions on these issues. And this failure did not go unnoticed by the learned trial judge.

[55] In this regard, we agree with submissions of learned counsel for the respondents that the High Court rightfully dismissed the prosecution's reliance on Dr Prashant's (PW50) evidence on the time of death as:

(a) he had contradicted his own post mortem report;

(b) such findings were made at the 11th hour solely based on photographs which were available to him from the start;

(c) Dr Siew (PW46) who was in a better position to determine the time of death was never asked on the issue of rigor mortis or hypostasis in determining time of death;

(d) PW46 himself testified that he could not determine the time of death despite conducting the first post mortem on the date of the incident; and

(e) Dr Prashant's own admission that rigor mortis and hypostatis are poor indicators to determine time of death, especially when heat rigor is present.

[56] Thus, we do not find any reason to interfere with the learned trial judge's finding that the prosecution had failed to establish the time of death of the deceased to be between 11pm on 13 June 2018 and 4am on 14 June 2018, as stated in the charge.

Last seen together theory

[57] The prosecution's case against the respondents is entirely based on circumstantial evidence. They rely on the last seen together theory to infer the guilt of the respondents. This theory states that where an accused is last seen with the deceased, in the absence of any plausible explanation, it can lead to a presumption of guilt although this is not necessarily conclusive. The Court of Appeal in *Rakesh Kumar a/l Thangagrajoo lwn Pendakwa Raya dan satu lagi rayuan* [2017] MLJU 618; [2017] CLJU 502 had occasion to consider the application of the last seen together theory by reference to the Indian Supreme Court case of *Ashok v State of Maharashtra* 2015 (4) SCC 393 that explained the theory in the following terms:

> The 'last seen together' theory has been elucidated by this Court in *Trimukh Marotiu Kirkan v State of Maharashtra* [2006] 10 SCC 106, in the following words:

Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.

In *Ram Gulab Chaudhary v State of Bihar* [2001] 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.

In *Nika Ram v State of HP* [1972] 2 SCC 80, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a 'Khukhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

The latest judgment on the point is *Kanhaiya Lai v State of Rajasthan,* [2014] 4 SCC 715. In this case this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarized as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per s 106 of Indian Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt.

[58] The application of the last seen together theory means that the prosecution is exempted from having to prove the exact happening of the incident on the basis that the accused himself would have special knowledge of the incident and thus, would bear the burden of proof. Case authorities neatly and succinctly state that where an accused is last seen with the deceased, in the absence of any plausible explanation by the accused, it can lead to a presumption of guilt although this is not necessarily conclusive (see: *Public*

Prosecutor v Jasendran a/l Sanmugam [2020] MLJU 1193; [2020] CLJU 1540; [2020] 1 LNS 1540 (HC)). However, it is well established that the fact that the deceased was last seen with the accused or accused persons is by itself insufficient evidence to determine the guilt of the accused. There must be something more. In *Public Prosecutor v Ho Sek Kong* [2006] 2 MLJ 81, the High Court noted:

> According to the commentary in *Ratanlal & Dhirajlal's Law of Crimes* (p 1425) 'the fact that the accused and the deceased were 'last seen together' is a circumstance of an incriminating nature against the accused -But the mere fact that the accused was last seen together with the deceased does not necessarily lead to the irresistible inference that he had committed the crime'. It cannot therefore be the sole basis for a conviction. However, taken together with his own confession, the court may make an inference of his guilt (*State v Shaik Mazhar* AIR 2001 SC 2427).

[59] Thus, in the absence of any other links in the chain of circumstantial evidence, it is not possible to convict the accused solely on the basis of the 'last seen' evidence (see: *Jaswant Gir v State of Punjab* (SC) India per P Venkatarama J). There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to proof of guilt (see: *Kanhaiya Lal v State of Rajasthan* 2014 AIR SCW 1828 (SC) India per C Nagappan J). This was reiterated by the Federal Court in *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 (FC), where the appellant was convicted by the High Court and the Court of Appeal for murdering his lover, in acquitting the appellant, Alauddin Sheriff PCA held that:

> ... no adverse inference of guilt can be drawn against the appellant from the fact that he was last seen with the deceased, he being no other than her own lover who is naturally expected to be with her.

[60] Further, in *Rajamorgan a/l Marimuthu v Public Prosecutor* [2014] 5 MLJ 565; [2014] 6 CLJ 850 this court disregarded the application of the last seen together theory in the absence of evidence of motive. In acquitting the appellant, held that the last seen evidence on itself was not sufficient to lead to an irresistible inference that the appellant committed the crime. This was especially so in light of evidence of good relationship since it was well established that the appellant and his wife had expressed their desire to adopt the deceased. In the absence of motive, the evidence of last seen together remained a mere suspicion devoid of any evidential value.

[61] In *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, the Federal Court in acquitting the appellant, held that it was not safe to rely on the other strains of circumstantial evidence as they were contradicted by other evidence. Given the circumstances, there was nothing adverse about the evidence of last seen together, as the appellant, being her lover was naturally

expected to be with her. The appellant was thus acquitted by the Federal Court.

[62] In essence, in the absence of other links to connect the accused persons to the crime, it is not possible to convict an accused person solely on the basis of being last seen together. Thus, in raising and relying on the last seen together theory the prosecution must show some connection between the respondents and the crime. In this case, there was no direct nor circumstantial evidence to show the respondents committed the offence. The High Court found that the prosecution's reliance on the last seen together theory was merely based on an assumption which does not amount to proof. We agree that the mere fact that the respondents were last seen together in the family home with the deceased was in itself not sufficient to connect the respondents to the death of the deceased. There must be something more. In this regard, the learned trial judge quite correctly found that in failing prove the time of the deceased's death, the last seen theory cannot be applied to prove the third element.

[63] The learned trial judge held that the failure of the prosecution to prove the time of death meant that the last scene together theory is not applicable in this case. In any case, the prosecution's contention that the respondents were last seen with the deceased was not proved sufficiently as it was merely based on the evidence of the deceased's driver, Nabil (PW28) who last saw the deceased when he was dropped home at 11.30pm on 13 June 2018. Further, in raising the last seen together theory the prosecution must show some connection between the respondents and the crime. The mere fact that they were last seen together was not sufficient to connect the respondents to the offence. With no evidence to show the deceased had died within the time as specified in the charge and in the absence of clear evidence to show that the respondents were last seen with the deceased, it raises multiple inferences as to the fire and injuries to the deceased. In relation to the maid, Eka, the High Court found that the Investigating Officer (PW57) was lackadaisical and not serious in pursuing the case against her. There was a complete failure to arrest and bring her to court even though they knew that she was working in Sarawak.

[64] In the circumstances of the facts of the case, we find that the last seen together theory does not help the prosecution at all, and the learned trial judge was quite correct to reject its application to the present case.

OPPORTUNITY TO COMMIT THE OFFENCE

[65] The prosecution submitted that the respondents had the opportunity to cause the injuries to the deceased and that this ought to be taken in tandem with the last seen together theory. This, we find is a misplaced argument. In *Sarkar Law of Evidence* (2nd Malaysian Ed) Vol 1 at p 403, the learned authors cautioned that a judge must be on guard against jumping hastily from

opportunity, to commission of a crime. There can be no crime without opportunity but there is a wide gulf between opportunity and commission. Again, there must be something more. It is settled law that evidence of mere opportunity, without more, cannot amount to corroboration. The mere fact of a party being so situated that an advantage would accrue to him from the commission of a crime does not amount to proof of him having committed it or does it amount to corroboration of it. This principle was applied by Augustine Paul J (later FCJ) in *Aziz bin Muhamad Din v Public Prosecutor* [1996] 5 MLJ 473; [1997] 1 CLJ SUPP 523, where he said:

> ... mere opportunity, without more, cannot amount to corroboration. Evidence of opportunity must be supplemented by proof of circumstances of such a nature as to lead to the inference that it was probable that advantage would be taken of the opportunity.

In *Aziz Muhamad Din,* the High Court found that the evidence of opportunity was not corroborated by other evidence. As such, the conviction by the sessions court was set aside and the appellant was acquitted.

[66] The Federal Court affirmed the principle enunciated in *Aziz Muhamad Din* in the case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800, where Zulkefli Makinudin FCJ stated:

> [45] It must also be noted that the appellant had the opportunity to have committed the crime (see s 7 and illustration (c) of the Evidence Act 1950). The evidence of opportunity in this case has been supplemented by proof of circumstances of such a nature as to lead to the inference that it was probable that advantage would be taken by the appellant of the opportunity (see *Aziz bin Muhamad Din v Public Prosecutor* [1996] 5 MLJ 473; [1997] 1 CLJ SUPP 523). The evidence adduced by the prosecution showed that the appellant was seen together with the deceased by the prosecution witnesses, PW4, PW5 and PW12 through the sequence of events taking place at the various locations.

[67] However in our case, there are no incriminating evidence whatsoever to support the application of the last seen together theory nor opportunity to commit the offence to tie the respondents to the death of the deceased. At the highest, it remains a mere suspicion devoid of any evidential value to implicate the respondents.

[68] The Supreme Court of India in *Irfan @ Naka v The State of Uttar Pradesh* (Criminal Appeal Nos 825–826 of 2022) (unreported) at p 34 reaffirmed *Sujit Biswas v State of Assam* 2013 AIR SCW 3281, where Dr BS Chauhan J examined the distinction between 'proof beyond reasonable doubt' and 'suspicion' and held that:

> Suspicion, however grave it may be, cannot take the place of proof, and there is a

large difference between something that 'may be' proved, and something that 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between 'may be' and 'must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the Court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, *the Court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record.* The Court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.

[69] In light of the above, we agree with submissions of learned counsel for the respondents that the evidence of last seen together and opportunity to commit the offence have not been supported by any cogent evidence to link the respondents to the offence as charged. The evidence tendered by the prosecution merely creates suspicion that the respondents as co-inhabitants in the family home had the opportunity to commit the offence, but that cannot be equated with the guilt of the respondents. As such, the mere presence of opportunity cannot be the basis to convict the respondents in the absence of any cogent evidence that establishes the guilt of the respondents beyond reasonable doubt.

[70] In this regard, the learned trial judge quite correctly made the following observation and conclusion:

[120] Dalam kes ini hanya keterangan menunjukkan bahawa si mati dilihat kali terakhir berada di tempat kejadian sebelum mati dan kali pertama dilihat bersama tertuduh selepas mati tidak boleh dengan sendirinya menjurus kepada inferent bahawa tertuduh merupakan orang terakhir bersama si mati sebelum mati dan melakukan kesalahan itu pada masa-masa yang dipertuduhkan. la mesti ada kesinambungan antara tertuduh dengan jenayah itu. Dalam kes ini tidak ada keterangan langsung mahupun ikut keadaan yang menunjukkan ketiga-tiga mereka melakukan kesalahan itu. Lebih-lebih lagi dalam kes ini tidak ada kesinambungan ditunjukkan antara masa-masa kejadian dengan ketiga-tiga mereka. Si mati hanya dilihat kali terakhir di rumah pada jam 11.30 malam pada 13 Jun 2018 tidak bersambungan dengan tertuduh dan dua kanak-kanak itu yang dilihat kali pertama bersama si mati selepas si mati dijumpai mati pada jam 12.42 tengahari 14 Jun 2018.

[121] Dengan ini mahkamah dapati pihak pendakwaan hanya mengandaikan

A sahaja kebersamaan terakhir si mati dengan tertuduh dan dua kanak-kanak itu pada masa-masa yang dinyatakan dalam pertuduhan. Mengandaikan hanya merupakan satu syak dan syak itu bukan satu keterangan pembuktian (rujuk nas *Rajamorgan a/l Marimuthu v Public Prosecutor* [2014] 5 MLJ 565 at p 573; [2014] 6 CLJ 850 ms 860 para 27; *Pendakwa Raya v Mohd Yahya bin Mat Sahri* [2016] MLJU 1736; [2016] 4 CLJ 227 ms 232 para 8). Oleh itu mahkamah ini dapati pihak pendakwaan telah gagal membuktikan teori orang terakhir bersama dengan si mati pada masa-masa kematian si mati seperti dalam pertuduhan.

[122] Dengan ketiadaan keterangan menunjukkan si mati mati dalam masa-masa pertuduhan dan ketiadaan keterangan yang jelas menunjukkan tertuduh dan dua kanak-kanak merupakan orang terakhir bersama-sama si mati dalam masa-masa pertuduhan, maka berbagai kemungkinan yang boleh dibayangkan (*infer*) mengenai kejadian kebakaran dan kecederaan si mati semasa di dalam bilik kejadian termasuk peranan dan kehadiran Eka di rumah kejadian antara selepas 4 pagi pada 14 Jun 2018 hingga si mati ditemui mati dan kebakaran berlaku. Eka pula dikatakan, tanpa dibuktikan, oleh pihak pendakwaan merupakan individu yang wujud berada di rumah kejadian sebelum si mati mati dan dibuktikan Eka adalah individu yang cuba ditemubual oleh Pegawai Penyiasat SP57 di Indonesia serta dijelaskan oleh SP57 bahawa pihak polis tidak dengan serius untuk meneruskan kes terhadap Eka tetapi Eka tidak pernah dikemukakan oleh pihak pendakwaan atau cuba sedaya upaya mengemukakan Eka untuk memberi keterangan atau setidak-tidaknya mengemukakan percakapannya. Dengan itu, mahkamah ini dapati pihak pendakwaan bukan sahaja tidak dapat membuktikan tertuduh atau KK1 atau KK2 melakukan pembunuhan dalam masa-masa yang menjadi hal perkara pertuduhan malah pihak pendakwaan tidak pasti akan si pelaku di sebalik keseluruhan kejadian kes ini.

[71] For the reasons stated and discussed earlier, we fully endorse the learned trial judge's above findings. Thus, we are disinclined to interfere with or disturb the findings of the learned trial judge in this regard.

Conduct and motive

[72] Conduct can be part of the evidence to prove the guilt of an accused person, especially where the prosecution's case is based on circumstantial evidence. However, the evidence of conduct must be a relevant fact to establish a fact in issue.

[73] In this case, the prosecution outlined some of Samirah's conduct and contended that they go towards establishing her guilt. These can be summarised as follows:

(a) not contacting the fire department about the fire;

(b) looking at the head of the deceased from left to right without any sad reaction;

(c) saying there was no sledgehammer when SP4 tried to open the bedroom door when there were two sledgehammers in the house compound;

(d) not showing a sad reaction and or surprise at other times;

(e) being in the house even though smoke had come out;

(f) when given the phone to contact the deceased's family, she said there was no need to tell them as she did not have a good relationship with them;

(g) crying and wailing while in the hearse and at the same time saying that the van was going too fast;

(h) discussing insurance after the tahlil prayers for the deceased; and

(i) objecting to the order to exhume the deceased's body for the second post mortem.

[74] The prosecution also alleged motive on the part of Samirah to commit the murder. There were several motives suggested by the prosecution, and they include:

(a) the alleged financial motive;

(b) the deceased's alleged intention to divorce Samirah; and

(c) the alleged bad relationship between the deceased and Samirah's two elder boys, the second and third respondents.

[75] It is well settled that for the court to rely on motive as a strand of circumstantial evidence, it must be satisfactorily proven based on clear and credible evidence. Evidence of motive should not be vague, non existent or unclear (see: *Pathmanabhan a/l Nalliannen v Public Prosecutor and other appeals* [2017] 3 MLJ 141 (FC) per Arifin Zakaria CJ).

[76] We have combed the evidence for motive and found none. In fact the learned deputy conceded that the prosecution had not tendered any cogent evidence of motive on the part of any of the respondents to kill the deceased. The alleged financial motive, the deceased's alleged intention to divorce Samirah, and the deceased's alleged bad relationship with the second and third respondents relied on by the prosecution to show motive were nothing more than speculation. The prosecution themselves admitted that the motives were vague and unclear.

[77] In fact, there was evidence of the deceased's sister, Che Elainee bt Che Hassan (PW21), the deceased's driver, Ahmad Edree bin Abdul Rashid (PW25), and the deceased's personal assistant, Nurul Anisah bt Abdullah (PW47), on the good relationship between the deceased and Samirah. The deceased's colleague, Eliza bt Elias (PW29) also testified as to the good and

loving relationship between the deceased and Samirah. Further, the evidence of text messages between Samirah and the deceased just a few days before his death showed an intimate husband-wife relationship. The evidence of good relationship negates the motive suggested by the prosecution and demolishes the inference of guilty conduct on the part of the respondents, in particular Samirah. In the absence of motive, the court must be vigilant and scrutinise the evidence very closely to ensure that suspicion, emotion or conjecture do not take the place of proof. More so when the prosecution's case is built entirely on circumstantial evidence.

[78] The learned High Court judge had considered the submissions of the prosecution as regards conduct and motive in some detail in para 124 onwards of the judgment. The learned High Court judge concluded that Samirah's acts and conduct gives rise to a myriad of interpretations and that they cannot form the basis or lead to the respondents' guilt. The acts or conduct of the respondents are not unusual nor do they point to the respondents' guilt. Some of the conduct complained of is capable of innocent explanation. The observation that Samirah did not seem sad after the deceased's death also does not necessarily indicate guilt. The learned trial judge quite correctly pointed out that different people react differently to any given situation and this is very much dependent on the character of the person. And in this regard, the learned judge had referred to the case of *Ling Hang Tsyr v Public Prosecutor* [2019] MLJU 1182; [2019] 1 LNS 1573, where the Court of Appeal had stated:

> As to the conduct of the appellant after the deceased was stabbed, which the learned trial Judge found operates against the appellant; we are of the view that conduct per se does necessarily point to the guilt of the appellant. Different people react differently to a given situation, especially after seeing the deceased soaked in blood. Although conduct of accused persons after an offence has been committed may be relevant towards proving the commission of a particular offence under s 8(1) of the EA, such conduct could also be inferred that the appellant was in a state of shock and stunned that she was not able to think straight at that precise moment. The benefit of the doubt should be given to the appellant. The fact that she only called the ambulance and her in laws later cannot be viewed as against the appellant. That by itself cannot be taken as proof of her participation/involvement in causing the death to the deceased.

[79] The prosecution further submitted by reference to a WhatsApp text message sent by Haziq to Samirah asking 'whats the plan', that this was indicative of something sinister. However, the prosecution's own witness had demolished this suggestion. The Investigations Officer (PW57) confirmed that that query by Haziq was in relation to the plan for Hari Raya which was the following day.

> DPP: Tak apa saya tak lanjutkan lagi kerana tak ada lah lagi soalan tentang itu. Tentang kaitan tetapi saya tanya pasal ASP kata tahu kan. Okay. Baik, tentang mesej Encik Haziq, kita dah lihat kalau sebelum ini. Ada screenshot yang ditanda sebagai

D, 'what's the plan?' Tentang 'what's the plan?' ASP masih ingat ya tentang itu? Atau nak rujuk balik atau ASP ingat apabila ASP ditanya tentang itu ya? ASP kata alasan mereka. Alasan Encik Haziq adalah hasil siasatan ASP adalah ini adalah plan raya. Plan nak beraya.

PW57: Plan nak sambut raya.

[80] Hence, the learned trial judge correctly concluded as follows:

[126] Begitu juga dengan tingkah laku KK1 yang tidak keluar rumah walaupun selepas bomba sampai dan mengenai mesej Whatsapp kepada tertuduh what's the plan? yang boleh diterima maksud dan situasi mesej itu dengan mengambil kira kemunasabahannya melalui keterangan saksi SP9, SP13 dan SP57. Kelakuan KK2 pula mengenai telefon meletup adalah tidak berkaitan dan tidak jelas yang boleh menjurus kepada kebersalahannya.

[127] Sementara motif pembunuhan tertuduh yang cuba dicadangkan oleh pihak pendakwaan mengenai faedah kewangan yang akan diperolehi oleh tertuduh serta masalah kewangan dan soal hasrat si mati hendak menceraikan tertuduh dan juga hubungan tidak baik si mati dengan tertuduh, KK1 dan KK2, merupakan motif yang tidak jelas dan samar-samar serta hanya merupakan cadangan pihak pendakwaan. Pihak pendakwaan gagal membuktikan apa faedah kewangan dan keuntungan yang akan diperolehi oleh tertuduh dari kematian ini. Pihak pendakwaan sendiri mengakui kesamaran motif dalam kes ini. Dalam kes *Ling Hang Tsyr v Public Prosecutor* menyatakan:

> [115] In cases which relied solely on circumstantial evidence, it is an essential factor that motive ought to be considered. In the case of *Lim Hean Chong @ Teo Heam Chong @ Teo Hean Chong v Public Prosecutor* [2012] 1 MLJ 1049; [2012] 2 CLJ 1046; [2011] 1 LNS 1078 the Court of Appeal in its judgment said that:
>
> > Where the prosecution's case is based solely on circumstantial evidence, motive is important in such cases to tilt the scale against the accused. Throughout the trial, the only motive suggested by the prosecution for the killing of the deceased was that the appellant had been angry because he was not happy with one of the coins he had purchased. A suggestion was not an evidence. Hence the prosecution has not established the motive for killing of the deceased.'
> >
> > In *Ratanlal and Dhirajlal Law of Crimes* (24th Ed) Vol 22 at p 1448 the learned author said that:
> >
> > Ordinarily, when there is sufficient, direct and circumstantial, evidence connecting the accused with the commission of the offence the proof of motive becomes unimportant. But where the entire prosecution case rests on the circumstantial evidence, motive undoubtedly plays an important part in such cases to tile the scale against the accused.
>
> [116] The defence submitted that there was no motive established by the prosecution for the appellant to kill the deceased. It was the learned trial judge's findings that the appellant was dependent financially on the deceased and hence when the appellant could not afford to lose this privilege, the murder plan was

initiated. However we find that the findings of the learned trial judge was against the weight of the evidence. It was in evidence by PW18 that both the deceased and the appellant had agreed to go for a divorce. Hence it is no longer an issue as both have agreed to go separate ways and lead their lives after the divorce proceedings. The impending divorce cannot be a reason for the killing of the deceased. In any event, this was merely the opinion of PW21, the investigation officer, which is unsubstantiated.

[117] The learned trial judge had made perverse findings of facts that the appellant was a beneficiary to a few insurance policies when the prosecution's evidence shows that there was no admissible or credible evidence to support such findings. The prosecution failed to prove that the appellant benefitted financially after the death of the deceased. The evidence shows upon the death of the deceased, the appellant did not inherit any money from the insurance policies bought by the deceased. The evidence of PW22, an insurance agent said that the appellant did not benefit a single cent from the insurance policies that the deceased took. As for the matrimonial home, it was purchased with the down payment paid by the appellant from the money gifted by her father (DW2). The house was already in the name of the appellant It was the appellant who has been paying the installments of the house. The house had to be sold as there is no one going to pay for the monthly installments for the loan as the appellant was already arrested after the murder of the deceased. Similarly with the car, after the appellant was arrested, she could no longer serviced the loan, hence the car was repossessed. Therefore the learned trial judge made erroneous findings when she found that the fact the matrimonial home and the car had to be sold or repossessed was because the appellant was dependent on the deceased financially.

[118] There was also the oral evidence from PW22 that the appellant submitted a claim for one of the insurance policies which was put on hold pending the disposal of this criminal case against the appellant. However, this was not supported by any documentary evidence as the appellant categorically denied that she did submit a claim.

[119] Therefore there is absolutely no motive established by the prosecution as to why the appellant would want the deceased dead.

[81] Generally, motive is not an essential ingredient for an offence of murder (see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101). However, where the prosecution's case rests wholly on circumstantial evidence, and where evidence of good relationship had been established between the deceased and the respondents, proof of motive becomes crucial to tilt the scale against them. See *Public Prosecutor v Letchumanan a/l Krishnan* [2008] 3 MLJ 290.

[82] However, having combed the evidence for motive, we found none. In fact the learned deputy conceded that the prosecution had not tendered any cogent evidence of motive on the part of any of the respondents to murder the deceased. The alleged financial motive, the deceased's alleged intention to

divorce Samirah, and the deceased's alleged bad relationship with the second and third respondents relied by the prosecution to show motive were devoid of any substance. It is well settled that for the court to rely on motive as a strand of circumstantial evidence, it must be satisfactorily proven based on clear and credible evidence.

[83] In the present case, we find that the learned trial judge's finding that there is no proof of motive is beyond reproach. Given the vague and unproven allegations of motive, we agree with the High Court's finding that the evidence of good relationship between the deceased and the respondents negates any alleged motive and demolishes the inference of guilty conduct on the part of the respondents.

[84] In this regard, it is worth noting that the prosecution was unable to produce a coherent case theory as to how the death happened, what the motives are, and a logical/reasonable theory as to how the respondents were involved in the death of the deceased.

INCENDIARY FIRE, BLAST AND STAGED CRIME SCENE

[85] The prosecution further argued that the fire in the bedroom was an incendiary fire that was deliberately set with petrol, and that the evidence of Dr Prashant (PW50) shows that the body of the deceased was moved after his death. Hence, the prosecution contended that it was a staged crime scene. The prosecution further contended that this showed there was an attempt to cover up the murder by staging the crime scene. Hence, the prosecution contended that the respondents and their co-accused, Eka their house-maid, who the prosecution misleadingly said was at large, must have moved the body of the deceased and caused the fire as they were the only ones in the house apart from the two toddlers. It must be noted that the prosecution's theory of a staged crime scene did not come from any of the police or fire investigators nor were any questions in this regard asked of the respondents when their statements were recorded. In fact, this theory came from the evidence of Dr Prashant (PW50) who was the only witness to proffer this theory, not even the Investigations Officer. This can be seen from the following comparative chart of the evidence of the several witnesses prepared by learned counsel for the respondents:

Accused Persons' Cautioned Statement	I.O, ASP Nizam (PW57)	Other Police Officers (PW7, PW34, PW38 & PW39)	Fire Investigators, Halim (PW15), Edwin (PW20) & Subhaan (PW51)	Dr. Siew (PW46)	Dr. Prashant (PW50)
Not a single question asked on a 'staged crime scene'.	No evidence / No questions asked by DPP.	No evidence / No questions Asked by DPP.	No evidence / No questions asked by DPP.	No evidence / No questions asked by DPP.	No mention of in the postmortem report nor witness statement. **Mentioned for the first time in oral EIC.**

[86] In relation to the prosecution's contention that the body was moved, the first pathologist, Dr Siew (PW46) who saw the fresh body never said such a thing nor was he questioned on this by the prosecution. It was only the second pathologist, Dr Prashant (PW50) who said this after a meeting with the prosecution a few days before testifying at trial. The Investigations Officer (PW57) gave no evidence of this alleged theory of the body being moved. It was never part of his investigation and as such, the respondents were never even asked of this when their statements were recorded. PW57 agreed that if at all a murder took place, it would be logical to burn the body on the mattress. Thus, we find that there is no plausible reason to move the body from the bed to the floor if the intention was to destroy the evidence of the crime by deliberately causing the fire.

[87] The learned trial judge found that PW50's evidence of rigor mortis and hypostasis to show that the body was moved was not convincing. This was mainly because PW50's conclusion was made merely based on photographs. Contrary to PW50's opinion on rigor mortis, the evidence of the FRD Officer Stanley Sigau Nyalang (PW11) showed that he faced no difficulty to bend the deceased's hand to move it into the body bag. The High Court, on the other hand, found Dr Siew's (PW46) evidence of heat rigor to be more convincing as he had the advantage of examining the body shortly after the incident. Further, PW46 was never asked about rigor mortis, hypostasis and the irregular lines on the body despite him being the most suitable expert witness to testify on this issue, as he examined the body very soon after death.

[88] In fact, Dr Prashant (PW50) agreed that he did not have any expertise in crime scene investigation. The opinion that he gave in respect of the body having been moved was beyond his realm of expertise. The reliability of an expert's conclusions may be questioned if he gives opinion on areas unrelated to his area of expertise, as if they carried the weight of an expert opinion (see: the Singapore Court of Appeal case of *Eu Lim Hoklai v Public Prosecutor* [2011] 3 SLR 167). Having met the prosecution a week before he came on the stand, PW50 suddenly offered new opinions which were not reflected in his post mortem report or witness statement. These opinions were beyond his scope of expertise, inconsistent with his own report, unsubstantiated by the overall circumstances of the case and were given without the benefit of actual examination of the body. Hence, they carry no probative value.

[89] The learned trial judge addressed this theory of the body having been moved in some detail before rejecting it. This is found from paras 100–103 of the judgment:

> [100] Pihak pendakwaan menarik perhatian mahkamah ini mengenai kaku mayat yang menunjukkan bahawa setelah si mati meninggal dunia jasad si mati telah dialih dari satu tempat yang lain ke tempat di mana si mati ditemui. Perkara ini timbul dari dapatan SP50 yang berdasarkan kepada keadaan mayat si mati yang mengalami 'rigor mortis' ketika ditemui yang dilihat tangan kanan dan kiri si mati berada dalam posisi tidak mencecah lantai bilik dan dalam keadaan terapung. Begitu juga betis si mati juga tidak mencecah lantai bilik yang menunjukkan mayat si mati mengalami rigor mortis. Bagitu juga terdapat bentuk irregular linear mark di belakang badan si mati dan satu distinct pattern di bahagian atas telahpun dialihkan setelah meninggal dunia dari satu tempat ke tempat di mana si mati dijumpai. Pihak pendakwaan menyatakan keterangan SP11 dan SP15 menyatakan bahawa si mati di dalam keadaan kaku dan kejung ketika ditemui di dalam bilik tersebut dan menyokong keterangan SP50.
>
> [101] Mahkamah dapati keterangan mengenai rigor mortis dan pattern ini hanya berdasarkan gambar yang dirujuk kepada SP50 iaitu gambar P111(21). SP50 hanya dapat menilai dari keadaan gambar sahaja tidak kepada keadaan sebenar jasad si mati. Semata-mata imej gambar tidak menerangkan segalanya kecuali terdapat keterangan yang boleh menerangkan keadaan sebenarnya bagi maksud dan kehendak dapatan P50 tersebut. Keterangan SP11 dan SP15 hanya menyatakan keadaan mayat kaku dan kejung. Sementara itu diteliti dari keterangan SP11 yang menyatakan bahawa beliau tidak mempunyai kesukaran untuk membengkokkan tangan si mati untuk dimasukkan jasad si mati ke dalam body bag. Begitu juga SP16 yang tidak pernah pergi ke rumah kejadian. Sementara SP15 dalam keterangan hanya melihat keadan mayat kaku tetapi tidak menyentuhnya. Dengan itu keadaan kaku dan kejung mayat itu yang disebut oleh SP11 dan SP15 itu tentunya berbeza dengan kaku mayat dari sudut kedoktoran SP50. Semesti keterangan SP11 dan SP15 ini tidak menyokong keterangan SP50 dari segi kaku mayat itu. Di dalam hal ini mahkamah ini lebih mempercayai keterangan SP46 yang merupakan doktor yang mula-mula melihat keadaan si mati sebaik saja di jumpai yang mana SP46 mendapati kekakuan mayat si mati lebih kepada 'heat rigor'.

A [102] Dr Siew SP46 tidak pernah ditanya mengenai isu rigor mortis, hypostasis, garis di belakang badan dan garisan dari arah di belakang badan si mati. Sewajarnya SP46 merupakan orang yang paling sesuai memperkatakan perkara ini dengan melihat kepada tubuh atau jasad Si Mati pada keadaan asalnya.

B [103] Dengan itu keterangan SP50 kurang meyakinkan mahkamah mengenai kaku mayat si mati dan hypostatis serta bentuk-bentuk pada belakang si mati sehingga boleh disimpulkan tubuh si mati telah dialihkan dari satu tempat ke tempat yang lain selepas kematianya.

C **[90]** Having combed the evidence, we agree with the findings of the learned trial judge that there is insufficient evidence to show that the deceased's body had been moved by someone after his death. We are of the view that PW46 who examined the body several hours after the deceased's death would have been the best person to advice on whether there was rigor mortis and hypostasis and not D PW50 who merely proffered his opinion based on photographs at trial. PW46 during the post mortem had found heat rigor and not post mortem hypostasis or rigor mortis and this must be given credence.

[91] The High Court found that there were no blast or explosion, and that E the fire was intentionally caused with the use of petrol. We find that the learned trial judge had erred in coming to these conclusions as there is insufficient appreciation of the evidence by the learned judge in these regards. In concluding that there was no blast the learned trial had failed to consider the evidence of the first pathologist Dr Siew (PW46) who had noticed blast injuries F to the neck and head of the deceased, and had stood firm in his opinion that the cause of death was due to 'complications of blast and blunt penetrating injuries'. If there was no explosion, as concluded by the learned trial judge, how then do we explain the blast injuries that PW46 had noted during the post mortem that he conducted.

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[92] Initially, PW46 was informed by officers of the FRD that there was an explosion of a mobile phone in the bedroom, and that according to PW46 had put to rest his nagging thoughts on the origins of the blast injury. However, a few days later, on 20 June 2018, PW46 was informed by PW20 at a meeting H that the FRD had revised their earlier finding and were now of the view that there was no blast at the bedroom and further stated that there was a finding of petrol like substance in the room. Despite this fresh information and change of stance by the FRD, PW46 still maintained the term 'blast' in his post mortem Report (P129) and only changed and clarified the cause of death from I 'Complication of blast injury' to 'Complication of blast and blunt penetrating injuries'.

[93] Hence, even after having the 'no blast' revised opinion fed by PW20, PW46 maintained in his report (P129) that 'Multiple smaller superficial blunt

penetrating injuries of various size were found on his face, neck, chest, left shoulder, back of left hand *bearing the pattern of shrapnel injuries in keeping with blast injuries*'. Now, the learned High Court judge in coming to his conclusion that there was no blast has failed to explain why he disregarded this crucial evidence of PW46, who had noticed a pattern of shrapnel injuries consistent with a blast. In this regard, we find that the learned High Court judge had failed to fully appreciate this crucial piece of evidence. PW46 found that the blunt force injuries to the head and the 16 penetrating injuries on the body of the deceased were unusual and maintained that he had sought further information from the FRD Officers on their investigations at the scene that would enable him to corroborate and explain all the injuries he found on the deceased, particularly the blast injuries.

[94] PW46 found blast wounds on the deceased together with track wounds in the brain, eye and shoulder. He also found collapsed lungs and mid ear bleeding which were all indicative of a blast. In fact, PW50 also agreed during cross examination that there was a possibility of a blast. ASP Mohd Sa'ad bin Mat Nasib (PW35), the explosion expert, testified that the handphone could have exploded with a small blast which could have caused a spark that started the fire. He agreed that indications were that there was a blast in the room but cannot determine the device or item that had exploded. Further, Dr Mohd Zulkiflee bin Abu Bakar (PW53), the ENT Specialist at PPUM, agreed that there could have been a blast which would explain PW46's finding of mid ear haemorrhage. He also agreed that it is possible the perforations in the deceased's eardrum could be caused by a blast. There is also the evidence of the Radiologist at HKL Datin Dr Mansharan Kaur (PW54) who said that her findings could be fire or blast related injuries in line with the given summary history. There was also the sort of a spray pattern visible on the bedroom wall, which was confirmed by the FRD Officer Ahmad Subhaan bin Mohamed (PW51) to be consistent with a blast. Hence, we find that there is a preponderance of evidence showing that there was a blast in the room, though the witnesses were not certain as to what may have caused the explosion or blast. We find that the learned trial judge had failed to scrutinise and consider these evidence in their totality and properly weigh the probabilities, before coming to the conclusion that there was no blast. In short, we find that there was a lack of judicial appreciation of the evidence by the learned trial judge. This, we find is a misdirection that warrants appellate correction.

[95] Now, we move on to the High Court's finding that the fire was not accidental but deliberately caused. This finding is primary based on the evidence of the FRD Science Officer Aznor Sheda bt Samsudin (PW14) who said that traces of petrol were found in some of the sample materials taken from the bedroom. Contrary to PW14's finding, the analysis of similar samples by Chemists at the Jabatan Kimia Malaysia, namely, Sivabalan a/l Nagayah

(PW41) and Renuka a/p Vitapamoorthy (PW42), did not find in any traces of petrol. Thus, analysis of similar samples from the bedroom, had given conflicting results.

[96] Apart from the Jabatan Kimia Malaysia officers not finding traces of any petrol or combustible material, there are other facts and testimonies as summarised in the table below that go against the finding of petrol by PW14. This can be seen from the chart below:

No	Evidence in support of positive petrol	Evidence in support of negative petrol
1	PW14's findings in samples C, D, E	PW41 confirmed no petrol in any of the samples
2	PW15 Fire origin	PW42 confirmed no petrol in any of the samples
3	–	K9 Unit did not detect any petrol (PW15, PW20 and PW51)
4	–	PW46 and his team of doctors confirmed no smell of petrol on the body
5	–	Small fire
6	–	No pour pattern

[97] Here, once again we find that there is a lack of appreciation of the totality of evidence by the learned High Court judge. The learned High Court judge has failed to explain why he chose to accept the evidence of PW14, when her testing and analysis did not conform to accepted standards, over that of the Jabatan Kimia Malaysia. The defence had highlighted the following shortcomings or concerns in PW14's testimony and conclusion:

(a) PW14's inconsistent and contradictory testimony makes the finding of presence of petrol unacceptable;

(b) PW14's analysis on samples C, D and E did not provide a petrol chromatogram pattern;

(c) PW14 ignored ions shown on the chromatograms of samples C, D and E that should not exist in a petrol finding;

(d) PW14 skipped blanks and PW14's two runs on the samples were not the same;

(e) PW14 did not use a certified petrol reference (either for commercial petrol or weathered petrol) as her reference sample to validate her alleged petrol finding on sample C, D and E;

(f) PW14's analysis was done in a rush without adhering to SOPs and

skipping steps needed in an analysis for petrol;

(g) PW14's recklessness in items (i) to (vi) above may have caused PW14 to mistakenly conclude samples C, D and E which were petroleum based products as samples containing petrol;

(h) petrol being vaporous and able to permeate ('meruap') in nature should have been found on other items; and

(i) shortcomings in samples collection/handling contributed would have compromised the findings of PW14.

[98] However, we note that the learned trial judge failed to give proper consideration to all these factors, and instead accepted PW14's evidence and concluded that petrol was present in the room and that it was used to deliberately start the fire. Having considered the totality of the evidence and the method of analysis, we are of the view that the analysis by the Jabatan Kimia Malaysia is to be preferred as that analysis is more objective and done in conformity with international standards. Reliance on the flawed analysis by PW14 would be a misdirection. This is compounded by the fact the sniffer dogs from the K9 Unit brought in to detect petrol or incendiary substance immediately after the fire was put out in the bedroom did not positively detect any such substance. Hence, we find the learned trial judge's conclusion that the fire was deliberately started is erroneous as it is not supported by cogent evidence. Thus we set aside the following findings of the High Court:

> [130] Setelah mahkamah ini meneliti dan mempertimbangkan kesemua keterangan saksi pihak pendakwaan, mahkamah ini dapati pihak pendakwaan telah membuktikan bahawa pada masa-masa kejadian tidak berlaku kejadian letupan sebaliknya kejadian kebakaran adalah disengajakan dan si mati telah dengan sengaja dicederakan dengan menggunakan senjata tumpul sehingga menyebabkan kematiannya.

COMMON INTENTION

[99] We now move on to another discomforting aspect of the prosecution's case. The respondents together with Eka, the fourth co accused, were jointly charged for the murder, and the prosecution relied on common intention as provided in 34 of the Penal Code.

[100] A general principle of criminal liability is that criminal culpability rests with the person who commits the offence, and only that person who committed the criminal offence can be held liable and punished in accordance with law. However, s 34 of the Penal Code recognises circumstances of joint liability in the doing of a criminal act. Section 34 provides:

> When a criminal act is done by several persons, in furtherance of the common

A intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[101] Now, s 34 of the Penal Code does not create a substantive offence but is a rule of evidence to infer joint liability for a criminal act performed by a plurality of persons (see: *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37 (CA)). The rationale behind this evidential rule was explained by the Singapore Court of Appeal in *Public Prosecutor v Gerardine Andrew* [1998] 3 SLR 736 in respect of their similar statutory provision in the following terms:

> The section was crafted in a way which would meet situations where it would be difficult to identify the exact acts of individual members of a party who acted in furtherance of their common intention. It allows for the imposition of the liability of a person who actually perpetrated the crime on to the participants of that crime. This extension of liability from the perpetrator to the participants is premised on the responsibility of participants for associating with such a crime, and then the consequences that could follow. However, such liability would also mean that a participant would be liable for an offence even though he did not commit the actus reus or have the mens rea for that particular offence.

[102] In essence, where a criminal act is the result of common intention, then every person who did the act or any part of it with common intention, would be responsible for the total offence irrespective of their share in the perpetration. In other words, once the prosecution has proved there was common intention among multiple persons, then the prosecution need not prove that a criminal act was committed by any individual, but against them jointly.

[103] The existence of common intention is a question of fact and in each case it may be proved by direct evidence or as a matter of inference from the established facts and circumstances of the case and/or conduct of the accused person(s). The leading authority on proof of common intention is the Supreme Court case of *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 where Syed Agil Barakbah SCJ held:

> In law common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention is not enough. There must be proved either by direct or by circumstantial evidence that there was: (a) a common intention to commit the very offence of which the accused person are sought to be convicted; and (b) participation in furtherance of that common intention.
>
> Where the prosecution cases rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time

between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused.

[104] Now, what is evident from the above case is that the prosecution must prove two elements, namely:

(a) a common intention to commit the very offence of which the accused person are sought to be convicted; and

(b) participation in furtherance of that common intention.

However, we note that there is not an iota of evidence establishing this two elements of common intention. The prosecution has failed to prove the existence of any common design or concerted plan preceding the death of the deceased. Nor, is there any evidence of participation by any one of the respondents. There is no evidence showing what the respondents did in respect of their involvement, if any, in the murder of the deceased that would make each and every one of them culpable for the offence. This is a fatal flaw in the prosecution's case.

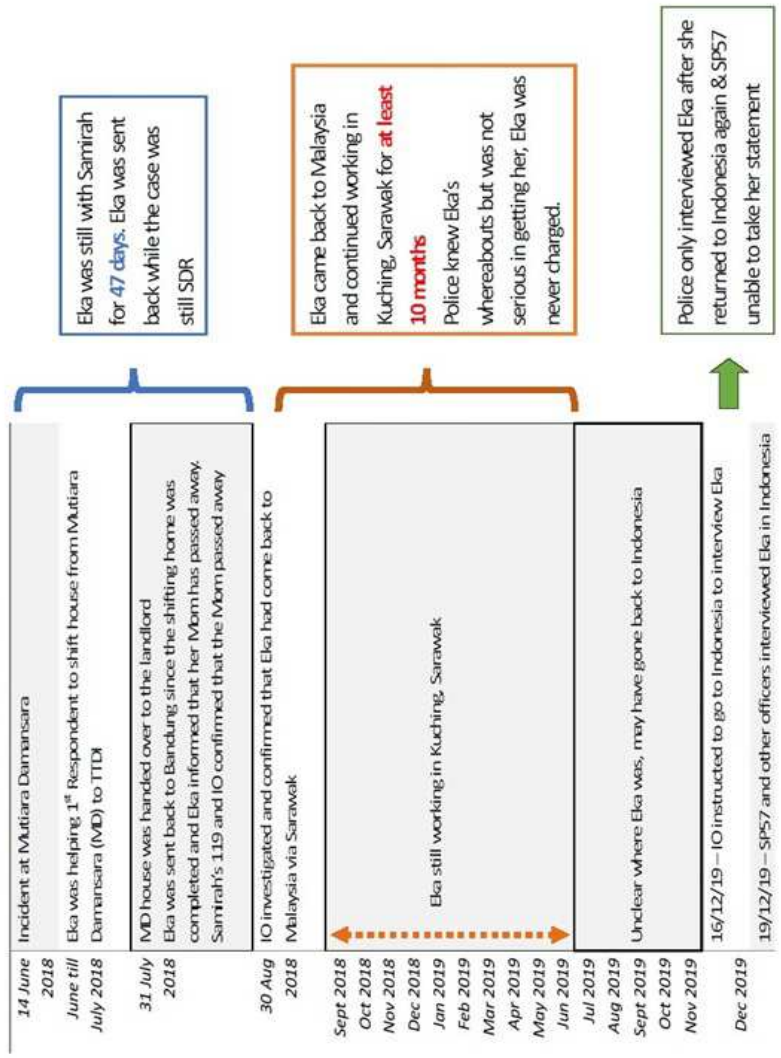
[105] The fact that the respondents were staying in the same house as the deceased in itself is not sufficient to infer that they had in any way participated in the murder of the deceased with common intention. Common occupation alone is not sufficient to infer either participation or common intention. This was correctly noted by Jeffrey Tan J (later FCJ) in *Public Prosecutor v Roslizam bin Abdul Azis & Anor* [2005] 1 MLJ 261:

> Any case against the second accused could only be on the basis that the second accused participate in the alleged act of trafficking in furtherance of a common intention, and or that the said alleged act was done by the first accused in furtherance of the common intention of both the first and second accused. But there is not an iota of evidence be it direct or circumstantial that the second accused participated in the alleged act of trafficking committed in the said house. There is not an iota of evidence of an overt or covert act on the part of the second accused that could be viewed as an element of participation on the part of the second accused. In any event, there is not an iota of evidence of any common intention. *The only evidence against the second accused, if it could be considered as such, is that he was also an occupier of the said house. But common occupation per se is not any evidence of any element of participation, or of common intention. Common occupation alone is not any evidence sufficient to infer any common intention or participation in the alleged act. In a word, the prosecution had not put forward any case of any sort against the second accused. There is positively no case against the second accused.*

[106] Apart from the fact that the respondents occupied the same home, there is no cogent or reliable evidence put forth by the prosecution of any acts done by the respondents in furtherance of any alleged common intention.

Thus, the prosecution has failed to prove the necessary elements to establish that there was common intention amongst the respondents to commit the crime charged with. A fortiori, the respondents cannot be said to have acted in concert or to be regarded as jointly liable for any alleged criminal act.

[107] This leads us to the house-maid, Eka, the co-accused at large, who the prosecution alleged was sent back by Samirah to 'hide' the 'crime'. The following timeline chart prepared and submitted by counsel for the respondents shows Eka's movement from the time of the deceased's death:


EKA'S MOVEMENT FROM INCIDENT DAY
14 June 2018
Incident at Mutiara Damansara
June till July 2018
Eka was helping 1st Respondent to shift house from Mutiara Damansara (MD) to TTDI
31 July 2018
MD house was handed over to the landlord
Eka was sent back to Bandung since the shifting home was completed and Eka informed that her Mom has passed away.
Samirah's 119 and IO confirmed that the Mom passed away
30 Aug 2018
IO investigated and confirmed that Eka had come back to Malaysia via Sarawak
Sept 2018
Oct 2018
Nov 2018
Dec 2018
Jan 2019
Feb 2019
Mar 2019
Apr 2019
May 2019
Jun 2019
Eka still working in Kuching, Sarawak
Jul 2019
Aug 2019
Sept 2019
Oct 2019
Nov 2019
Unclear where Eka was, may have gone back to Indonesia
16/12/19 – IO instructed to go to Indonesia to interview Eka
Dec 2019
19/12/19 – SP57 and other officers interviewed Eka in Indonesia
Eka was still with Samirah for 47 days. Eka was sent back while the case was still SDR
Eka came back to Malaysia and continued working in Kuching, Sarawak for at least 10 months
Police knew Eka's whereabouts but was not serious in getting her, Eka was never charged.
Police only interviewed Eka after she returned to Indonesia again & SP57 unable to take her statement

[108] It is rather perplexing to note that, despite Eka being charged together with the respondents in March 2019, as seen in the above timeline, Eka was never arrested and brought to court despite multiple opportunities the police had to do so. This only goes to show that the police, and by extension the prosecution, were never serious in pursuing her or getting to the bottom of this tragedy, if indeed there were elements of criminality involved.

[109] As to why Eka was sent back to Indonesia, the Investigations Officer (PW57) confirmed that Samirah had explained in her statement the circumstances leading to Eka's termination of employment as her housemaid and her subsequent return to Indonesia. Sometime in July 2018, after Samirah had shifted house to Taman Tun Dr Ismail in Kuala Lumpur, Eka had begged Samirah to let her return to Bandung as her mother had just passed away. Samirah had agreed to Eka's request and proceeded to terminate her employment and sent her back to Indonesia. Hence, there was an innocent explanation for Eka's departure. The defence then confronted the Investigations Officer (PW57) with the defence's own findings of Eka's whereabouts by mainly using the search machinery on Facebook. What was evident and undisputed is that Eka was in fact in Kuching, Sarawak, working at a kopitiam at the material time after the charge had been laid in court. In spite of this, the police never made any attempts to arrest and bring her to court. PW57 agreed that the Police had not thoroughly pursued their investigation on Eka and finally admitted that the police were never serious in pursuing a case against her. Hence, to say that Eka, the other co-accused named in the charge, was at large, is to say the least, misleading, and the prosecution was not playing fair.

CONCLUSION

[110] Hence, for the reasons stated above, we find that the prosecution has failed to prove a prima facie case. The appeal is dismissed and the order of the High Court is affirmed, albeit for reasons which are different from that of the High Court.

Prosecution's appeal dismissed and respondent's acquittal and discharged affirmed.

Reported by Ashok Kumar